No. 84-550 (2)

In the Supreme Court of the United States

October Term, 1984

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BRAE CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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UNITED STATES OF AMERICA and
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Petitions for Review of Orders of the
Interstate Commerce Commission

Argued June 5, 1984

Decided June 27, 1984

Robert N. Kharash, *Mark L. Evans*, *Gerry Levenberg*, and *John M. Nannes*, with whom *Peter D. Dickson* and *Deborah M. Gottheil*, for Brae Corporation, *Robert N. Kharash*, *Olga Boikess*, and *Edward D. Greenberg*, for International Paper Company, *et al.*, *John F. Donelan*, *John M. Cleary*, *Frederic J. Wood*, and *Nicholas J. DiMichael*, for National Industrial Transportation League, *et al.*, *Carl V. Lyon* and *James P. Tuite*, for Itel Rail Corporation, Rail Division, *et al.*, *Charles H. White, Jr.*, for SYSCO Corporation, *et al.*, *Gordon P. MacDougall*, for Patrick W. Simmons, *Dickson R. Loos* and *David H. Baker*, for Aluminum Association, Inc., *Brian C. Mohr*, for Bangor and Aroostook Railroad Company, *et al.*, *Andrew P. Goldstein*, for National Railway Utilization Corporation, *et al.*, *John C. Danielson*, for Central Vermont Railroad, *et al.*, *Thomas F McFarland, Jr.*, and *Steven J. Kalish*, for Board of Trade of the City of Chicago, *et al.*, *Peter A. Greene*, for Angelina and Neches River Railroad Co., *J. Raymond Clark* and *Mary Todd Foldes*, for Sandersville Railroad Company, *Hanford O'Hara* and *Alice C. Saylor*, for Bessemer & Lake Erie Railroad Company, *et al.*, *Robert Gensburg*, for Lamoille Valley Railroad Company of Morrisville, Lamoille County, Vermont, *Martin W. Bercovici*, for Rubber Manufacturers Association, *Robert A. Cantor* and *David A. Vaughn*, for E.F. Hutton Credit Corporation, *Fritz R. Kahn* and *Russell E. Pommer*, for Pittsburgh and Lake Erie Railroad Company, Seattle and North Coast Railroad Company, and Weyerhaeuser Company, *et al.*, *Thomas C. Dorsey*, for American Short Line Railroad Association, and *Charles W. Chapman*, for East Camden & Highland Railroad Company, were on the joint brief, for petitioners and intervenors Brae Corporation, *et al.*, in Nos. 83-1462, 83-

1465, 83-1466, 83-1468, 83-1469, 83-1479, 83-1490, 83-1538, 83-1543, 83-1544, 83-1546, 83-1547, 83-1551, 83-1555, 83-1571, 83-1572, 83-1577, 83-1614, 83-1628, 83-1665, 83-1673, 83-1700, 83-1709, 83-1710, 83-1717, and 83-2245. *John F. Donelan, Jr.*, also entered an appearance for National Industrial Transportation League, *et al.*, in Nos. 83-1700 and 83-2245. *Harold E. Spencer* also entered an appearance for Evans Products Company in No. 83-1717. *Basil Cole* also entered an appearance for Central Vermont Railway, Inc., *et al.*, in No. 83-1572. *Howard D. Koontz* also entered an appearance for Illinois Central Gulf Railroad Company, *et al.*, in No. 83-1655.

Richard Flynn, with whom *Terence M. Hynes* was on the brief, for petitioners Canadian National Railway Company, *et al.*, in No. 83-1558. *John Will Ongam* also entered an appearance for Canadian National Railway Company, *et al.*, in No. 83-1558.

John Guandolo, with whom *George W. Selby, Jr.*, for Sea-Land Service, Inc., *et al.*, and *Brock Adams* and *Joseph H. Dettmar*, for Totem Ocean Trail Express, Inc., were on the joint brief, for petitioners and intervenor Sea-Land Service, Inc., *et al.*, in No. 83-1574. *John T. Downing* also entered an appearance for Sea-Land Service, Inc., *et al.*, in No. 83-1574.

Michael Joseph, with whom *T.S.L. Perlman* was on the brief, for petitioner Board of Port Commissioners for the City of Oakland in No. 83-1718.

John Broadley, General Counsel, Interstate Commerce Commission, with whom *J. Paul McGrath*, Assistant Attorney General, Department of Justice, *Henri F. Rush*, Associate General Counsel, *Louis Mackall* and *Richard J. Osterman, Jr.*, Attorneys, Interstate Commerce Commission, and *Barry Grossman* and *John P. Fonte*, Attorneys, Department of Justice, were on the joint brief, for respondents.

Paul A. Cunningham, with whom *Arthur W. Adelberg*, *Bruce B. Wilson* and *Richard A. Mehley*, for Consoli-

dated Rail Corporation, *William R. Power*, for Burlington Northern Railroad Company, *Thurmond A. Miller* and *Lois P. Warchot*, for Southern Pacific Transportation Company, were on the joint brief, for intervenors Consolidated Rail Corporation, *et al.*, in Nos. 83-1462 83-1465, 83-1466, 83-1468, 83-1469, 83-1479, 83-1490 83,1538, 83-1543, 83-1544, 83-1546, 83-1547, 83-1551, 83 1555, 83-1558, 83-1571, 83-1572 and 83-1614.

Nelson J. Cooney and *Kenneth E. Siegel*, for American Trucking Associations, Inc., *Marshall Kragen*, for Brown Transport Corporation, and *Edward J. Kiley*, for Interstate Carriers Conference, Inc., were on the joint brief for intervenors American Trucking Associations, *et al.* in Nos. 83-1465, 83-1469 and 83-1479.

William P. Jackson, Jr., was on the statement in lieu of brief for intervenors Eastern Industrial Traffic League, Inc., *et al.*, in No. 83-1490.

W. Terry Maguire entered an appearance for intervenor American Newspaper Publishers Association in No 83-1469.

John R. Bagileo and *Leo C. Franey* entered appearances for intervenor Volkswagen of America, Inc., in No 83-1490.

William R. Power entered an appearance for intervenor Burlington Northern Railroad Company in No. 83 1551.

Before ROBINSON, *Chief Judge*, and WALD and MIKVA *Circuit Judges.*

Opinion *per curiam.*

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PER CURIAM*: We today confront the relationship between the Interstate Commerce Commission (ICC or Commission), railroad carriers and shippers, and the deregulatory objectives embodied in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). Petitioners in this case seek review of four related Commission decisions that exempt boxcar traffic from rate regulation and that substantially modify the basis upon which railroads may use boxcars owned by others. These decisions, affecting approximately twenty-five percent of all rail traffic moving throughout the United States, apply to all geographic regions, to all railroads, and to all types of boxcars—equipped, unequipped, refrigerated, and livestock. Thus, it is hardly surprising that numerous parties petitioned this court to review the Commission's decisions and that our opinion today addresses the merits of over thirty consolidated cases.

Petitioners assert a host of challenges to the Commission's decisions. The petitioners raise questions concerning the Commission's statutory authority and questions regarding the substance of many Commission conclusions. In response, the Commission rests on that section in the Staggers Act, 49 U.S.C. § 10505(a) (Supp. V 1981), which allows the ICC to deregulate the railroads, and argues that its decisions are supported in the record and are consistent with congressional goals. For the reasons set forth below, we find merit in some of the petitioners' arguments and conclude that in parts of its decisions the Commission failed to consider certain factors and, additionally, exceeded the scope of its statutory authority. We thus affirm in part, vacate in part, and remand the case to the Commission.

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* The opinion in this case is issued *per curiam* because the complexity of the issues raised on appeal made it useful to share the effort required to draft this opinion among the members of the court.

I. Background

On May 22, 1981, the Consolidated Rail Corporation (Conrail) petitioned the Interstate Commerce Commission (ICC or Commission) to deregulate all aspects of the transportation Conrail provided in boxcars. Conrail argued that the rates it received for boxcar traffic did not cover its variable costs. "The rates are wrong, the divisions are too low, and the car hire rates are unfair." Conrail pointed to the nationwide surplus of boxcars as evidence of problems with the current regulations. In response, the ICC instituted a rulemaking proceeding, proposing the application of Conrail's deregulation petition to *all* boxcar traffic nationwide. 47 Fed. Reg. 4100 (1982). Following the Commission's receipt of many negative comments, Conrail offered a less extensive proposal.

In a series of four decisions, issued from April 1983 through December 1983, the Commission adopted Conrail's modified proposal on a national basis. In *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 424 (1983) (*Boxcars I*), the Commission reached its initial decision. In *Exemption from Regulation—Boxcar Traffic*, 367 I.C.C. 747 (1983) (*Boxcars II*), the Commission denied petitions for reconsideration and further refined its analysis. In *Exemption from Regulation—Boxcar Traffic*, served November 30, 1983 (not printed) (*Boxcars III*), the Commission denied petitioners' motions for a stay pending appeal. And, in *Exemption from Regulation—Boxcar Traffic*, served December 19, 1983 (not printed) (*Boxcars IV*), the Commission addressed certain issues raised by the Association of American Railroads, specifically focusing on questions of antitrust liability. The *Boxcars* decisions became effective January 1, 1984, with the exception of the car hire modifications as applied to Class III carriers (small railroads). As to Class III carriers, the decisions were to become effective July 1, 1984.

The Commission initially based its decision on its power to deregulate, 49 U.S.C. § 10505(a), *and* on its

power to regulate the compensation paid for the use of freight cars, 49 U.S.C. § 11122. *See Boxcars I*, 367 I.C.C. at 456 ("We recognize, however, that [Conrail's modified proposal] could be construed in some respects as being new regulation. To allay any doubt about the sufficiency of section 10505(a) as authority for our approval of Conrail's modified proposal, we shall take this action also under section 11122."). In *Boxcars II*, however, the Commission withdrew any reliance on its regulatory powers under section 11122. *Boxcars II*, 367 I.C.C. at 759. Thus, the Commission's decision rests entirely on its deregulatory powers.

The Commission's deregulatory powers trace to section 10505(a) of the Staggers Act. That section provides:

> (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
>
> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a) (Supp. V 1981). In turn, section 10101a, referenced in subparagraph 1, lists fifteen different national rail transportation policies. 49 U.S.C. §§ 10101a(1)-(15) (Supp. V 1981).

The first focus of the *Boxcars* decisions is the Commission's regulation of the rates that a railroad carrier may charge for the transportation of freight in boxcars (freight rate). Prior to the decisions under review, the Commission had jurisdiction to find rates unreasonably

high when such rates exceeded specified ratios of revenue to variable cost. 49 U.S.C. 10701a(c)(4)(B). Moreover, the Commission also exercised certain supervisory powers over the rates for shipments transported jointly by two or more connecting carriers—that is, joint rates. *See, e.g.*, 49 U.S.C. §§ 10705, 10705a.

The *Boxcars* decisions removed all regulations on freight rates, including joint rates. The Commission found that freight rates could be deregulated under section 10505(a) of the Staggers Act because the regulations were unnecessary to implement the national transportation policy and because the regulations were not needed to protect shippers from an abuse of market power. The linchpin in the Commission's "abuse of market power" analysis was the pervasive pattern of competition between trucks and rails, as evidenced at least in part by an admittedly controversial study submitted by Conrail. The Commission, however, indicated that it would reimpose freight rate regulations to any commodity in which shippers subsequently introduced evidence revealing an abuse of market power and a need for protection. *See Boxcars I*, 367 I.C.C. at 40-41.

The Commission also concluded that its deregulatory posture would not harm Class III carriers (small railroads). These carriers feared that the deregulation of joint rates would allow large carriers to establish rates that would undermine the competitiveness of the joint route, or would otherwise lead to the demise of many small carriers. The Commission found this argument unpersuasive and concluded that, in light of the pervasive truck competition, large carriers would not cancel joint rates with Class III carriers where the Class III carrier provided an efficient route. *Boxcars II*, 367 I.C.C. at 753-54. Moreover, the Commission concluded that the economic disaster forecast by the Class III carriers would not occur because small carriers have sufficient bargaining power to protect themselves. *Id.* at 766-67. The Com-

mission conceded that some inefficient Class III carriers might be driven out of business, but concluded that the cancellation of such inefficient routes was in the public interest. *Id.* at 754. The Commission retained jurisdiction over mandatory interchange, reciprocal switching, and the joint use of terminal facilities.

The next focus of the *Boxcars* decisions is car hire—the financial relationship between boxcar owners (originating carriers) and the railroad over which the cars travel (destination carriers). Prior to the *Boxcars* decisions, a carrier that owned or leased boxcars received compensation from the railroad over which its cars were traveling. The amount of such compensation, known as the per diem rate, was based on a Commission-established formula that distributed the costs of car ownership evenly over the days in which the car was in service. This per diem rate accrued for *all* periods that the boxcar was off line, regardless of whether it was empty or full. Thus, the destination carrier paid per diem even after the car was sitting idly on its tracks. This system of compensation, the Commission found, created incentives for the originating carrier to load its own cars and to return other cars empty. The Commission argued that as a result of this incentive, American railroads were inefficiently devoting substantial resources to the movement of empty boxcars. Moreover, the Commission suggested that the per diem structure contributed to the current surplus of boxcars by guaranteeing a return on boxcar costs, regardless of the ratio of supply to demand.

The *Boxcars* decisions modify the relationship between the originating carrier and the destination carrier. The Commission believed that these modifications, which it considered a "partial exemption from regulation subject to conditions", would ameliorate market efficiencies because incentives to ship empty boxcars would be reduced and because market factors would gain importance in the pricing of car hire. Although leaving untouched the basic

per diem structure, the Commission modified the car hire relationship in three significant ways. First, the destination may now impose storage charges on the originating carrier for boxcars that have been empty for seventy-two hours. Because these storage charges are designed to offset the per diem rate that the destination carrier owes the originating carrier, the storage charges may not exceed the corresponding per diem. Second, the destination carrier may charge a fee for the return of an empty boxcar when such return is requested by the originating carrier. The charge, however, cannot exceed thirty-five cents per mile. Third, carriers that enter agreements governing car hire rates, empty movements, and storage are freed from the Commission's car hire rules.

Our opinion addresses each major issue *seriatim*. In Part II, we find that the Commission's "abuse of market power" analysis withstands review. In Part III, we hold that the Commission's analysis of the deregulatory impact on small carriers and joint rates is arbitrary and capricious. In Part IV, we hold that the Commission exceeded the scope of the Staggers Act exemption provision in adopting the new car hire rules. In Part V, we hold that the Commission improperly included the Alaska Railroad within the scope of its rate exemption. In the remainder of the opinion, we address, and reject, the complaints of the Canadian carriers and the Port of Oakland.

II. Maximum Rate Exemption

A. *The Commission Decision*

The Commission exempted freight rates that carriers charge shippers for boxcar transportation from all regulation because it concluded that rate regulation was not needed either to further the rail transportation policy of 49 U.S.C. § 10101a, or to protect shippers against abuses of market power. Its conclusions were based on a finding that boxcar freight rates would not increase unreasonably in the absence of regulation because rail carriers did

not have sufficient market power in the transportation market for goods that travel by boxcar to inspire unreasonably high prices. This finding was relevant to both inquiries under the Staggers Act exemption provision, 49 U.S.C. § 10505(a). First, one aspect of the rail transportation policy is the maintenance of reasonable rates. 49 U.S.C. § 10101a(6). Second, the existence of unreasonable rates is a sympton of market power abuse.

Focusing primarily on intermodal and intramodal competition, the Commission concluded that "the market itself places an effective ceiling on rail rates for boxcar transportation, and regulation is unnecessary to assure that boxcar rates do not rise to unreasonably high levels." *Boxcars I*, 367 I.C.C. at 433. The linchpin in the Commission's analysis is the presence of pervasive truck competition—its conclusion that goods transportable by boxcars can also, in the vast majority of cases, be carried by trucks. But the ICC relied as well on intramodal competition, the shipper's ability to select alternative railroad routes, to use other non-boxcar railroad equipment to carry goods, or finally to transport goods by trailer on flat car (TOFC) or container on flat car (COFC).

The Commission further reasoned that rates would be restrained by the carriers' reluctance to set a rate so high that the shipper could not compete in the ultimate product market. Thus, it concluded, the carrier would not fix its rates at a level that would drive the shipper out of business because in that event the railroad iteslf would lose the shipper's business. It also focused on the fact that many large shippers operate from several locations. "Thus, even if a carrier should find itself in a position to charge an unreasonably high rate to the company at one location, it normally would refrain from doing so to avoid a retaliatory loss of the shipper's business at that or at other locations where competition exists." *Boxcars I*, 367 I.C.C. at 434.

In addition to these generic constraints on boxcar rates the Commission looked at data on past boxcar transportation in assessing railroads' market power and the likelihood of abuse of such power. In particular it looked at the percentage of total traffic handled by boxcars and by trucks, and at revenue to variable cost ratios (r/vc) for boxcar transportation of commodities. According to the Commission, this data supported a conclusion that railroads lacked the necessary degree of market power over the transportation of commodities that travel by boxcar to pose a potential for abuse.

The primary factual basis for the Commission's conclusion was a 1980 Conrail study exploring 18 groups of commodities moving to, from, or within the Northeast. This report indicated that for each commodity group in that region, trucks had a substantial share of the market and r/vc did not exceed the relevant percent threshold for ICC authority to review rates. *See* 49 U.S.C. §§ 10701a, 10709. Within these groups, however, the percentage of truck carriage varied substantially, from very high to very low. The Commission also cited a DOT 1977 nationwide study indicating that for 25 groups of commodities, all had a truck market share of at least 20%. Finally, the Commission reviewed specifically "those few commodities about which the greatest cause for concern has been presented." *Boxcars I*, 367 I.C.C. at 436. The Commission focused on auto parts, paper and forest products, grain, and metals, and concluded that in none did the railroads have market power for section 10505(a) purposes.

In sum, the Commission relied on the pervasive and increasing role of trucks in transporting commodities that typically travel by boxcar, buttressed by the Conrail study, the DOT study, and general findings about competition in the boxcar freight transportation market, to conclude the regulations generally were unnecessary to protect the shippers from an abuse of market power.

It then looked at several specific commodities—those which petitioners' comments identified as presenting the closest questions—and decided that its conclusions that rail carriers held no market power over shippers held true for those specific commodities as well.

The Commission recognized that its determination that railroads overall were not in a position to abuse market power could mask individual situations vis-a-vis particular shippers, commodities or locations that might hold a potential for carrier abuse. But in light of the strong deregulatory thrust of the Staggers Act, especially of the exemption provision, it decided that an exemption for boxcar rates was nonetheless justified, stating:

> Conceivably, there exists a specific commodity that for some reason can be transported only by boxcar and on which the rate levels, being uncontrolled by intramodal competition or other market forces, would rise to very high levels in the absence of regulation. We do not totally rule out the possible existence of such a situation. Congress desires that we move aggressively forward in extending the exempt sector of rail transportation without laboriously erasing every shadow of a doubt before we act. . . . Congress declared that we should instead make exemptions effective and then deal with any special problem "after the fact," not on *a priori* possibilities.

Boxcars I, 367 I.C.C. at 440-41. Petitioners, in the main, challenge the Commission's decision to exempt boxcar rates in the face of these acknowledged uncertainties about future abuses of market power in particular situations.

B. *Abuse of Market Power*

1. *The standard of review*

This court must review the Commission's exemption of boxcar freight rates from regulation, implementing the exemption provision of the Staggers Act, 49 U.S.C.

§ 10505(a), to see if it was arbitrary and capricious, an abuse of discretion or otherwise contrary to law. *See* 5 U.S.C. § 706; *National Small Shipments* v. *Civil Aeronautics Board*, 618 F.2d 819, 826 (D.C. Cir. 1980) (applying section 706 to exemption of airlines from regulation); *American Trucking Associations* v. *ICC*, 656 F.2d 1115, 1125 (5th Cir. 1981) (applying "arbitrary and capricious" standard to exemption of trailer or flat car transport from regulation under 49 U.S.C. § 10505(a)). Petitioners here challenge the ICC's finding that continued regulation is not necessary to protect shippers from abuses of market power on the ground that this finding was arbitrary and capricious.

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicles Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, —— U.S. ——, 103 S. Ct. 2856, 2866-67 (1983) [hereinafter cited as *Airbags*]. Nevertheless, the agency must consider all critical aspects of the problems before it, and must articulate a reasoned explanation for its action, including "a rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962). Petitioners here suggest that judicial review must begin with a presumption that significant changes in current policy from traditional norms of regulation must be explained, and "where, as here, the challenged action represents 'a departure from prior policies and precedents,' the Court's 'level of scrutiny' is heightened." Brief of Petitioners and Intervenors on Common Issues at 35 (quoting *Office of Communication of United Church of Christ* v. *Federal Communications Commission*, 707 F.2d 1413, 1425 (D.C.Cir. 1983)) [hereinafter cited as Joint Brief for Petitioners]. But, the Supreme Court has recently emphasized that abandonments of existing rules and policies are not to be reviewed under a heightened standard of scrutiny, *see Airbags*, 103 S. Ct. at 2865;

rather the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive. *See id.* at 2866 ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change"); *International Ladies' Garment Workers' Union* (ILGWU) v. *Donovan*, 722 F.2d 795, 813 (D.C. Cir. 1983). We would note as well that this case differs materially from *Airbags* and *ILGWU* in one respect. Congress itself has found that the structure of the transportation industry has changed so that "many of the Government regulations affecting railroads have become unnecessary and inefficient," H.R. Rep. No. 1430, 96th Cong., 2d Sess. 79 *reprinted in* U.S. Code Cong. & Ad. News 4110, 4111 (conference report) [hereinafter cited as *Conference Report*], and has furthermore commanded the Commission to remove by exemption "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers." *Id.* at 105. Given that explicit congressional mandate, we do not believe the Commission need as exhaustively review and explain away its original justifications for abandoned regulations as if it were operating under the same statute it always had.

The Commission, on the other hand, argues that we must be especially deferential in reviewing its exemption decisions since they inevitably involve judgments and predictions of economic consequences and behavior which are inherently uncertain in nature but which Congress expressly delegated to the Commission. Brief for Respondents at 33-34; *see also American Trucking Associations*, 656 F.2d at 1127. We do, of course, recognize that in some circumstances "complete factual support in the record for the Commission's judgment or prediction is not possible or required." *Federal Communications Commissiion* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978); *see also National Small Shipments* v. *Civil Aeronautics Board*, 618 F.2d 819, 829 (D.C. Cir. 1980) (applying principle to predictions about

deregulation's effects on airline price competition and price discrimination). But we must point out as well that the predictive nature of the ICC's findings does not, by itself, alter our basic standard of review, which focuses on the reasoned nature of the Commission's decision, taking into account the nature of that decision and of the components that can be reasonably expected to go into it. Thus, when the facts relied upon by the Commission are insufficient, by themselves, to support its ultimate conclusion with certainty, it must identify the uncertainties, *see ILGWU*, 722 F.2d at 814 n.33, explain why it acted prior to "engaging in a search for further evidence," *Airbags*, 103 S. Ct. at 2871, and state what considerations led it to resolve the uncertainties as it did. *See Small Refiner Lead Phase-Down Task Force* v. *Environmental Protection Agency*, 705 F.2d 506, 520 (D.C. Cir. 1983).

2. *"General" market constraints*

Petitioners contend that the Commission had no basis in the record for its conclusions regarding general market constraints such as alternative forms of transportation, leverage of large shippers, and product and geographic competition. For each constraint they cite record evidence showing substantial numbers of shippers who do not enjoy the benefits of the constraints. *See* Joint Brief for Petitioners at 67-72. They further attack the Commission's economic analysis, disagreeing with its conclusion that the existence of product and geographic competition, without more, constrains market abuses against shippers.

But it seems to us petitioners misapprehend the significance the Commission allotted to each of these factors. The Commission recognized that the factors enumerated above were only general constraints in the transportation market and that the circumstances of some individual shippers were such that they might not be constrained by

any or all such factors. *See Boxcars I*, 367 I.C.C. at 433-34. While the Commission did not always cite specific record evidence for its conclusions about market constraints, our perusal of the record convinces us that it did in fact rely on uncontroversial facts that were within its expert knowledge and which petitioners do not contest. *See, e.g., Boxcars I*, 367 I.C.C. at 433 (most items that can be loaded in a boxcar can be loaded in a truck; motor carriage tends to be faster, more accessible, and more convenient; alternate rail routes and TOFC/COFC service give many shippers the benefit of intramodal rail competition). Furthermore, while we find merit in the petitioners' argument that absent evidence about cross-elasticities of particular commodities with substitute products or commodities from other geographical locales, existence of product and geographical competition says little about the constraints such competition places on carriers vis-a-vis shippers, we do not find the Commission relied on product or geographical competition for more than its limited worth. *See Boxcars I*, 367 I.C.C. at 434.

In sum, we believe that the Commission recognized full well the generalized nature of some of its predicted constraints on market abuse. While reliance on any one of these factors alone might not justify a finding that railroads could not abuse their market power, it was not unreasonable for the Commission to conclude that together the factors assured this. The Commission further bolstered these constraints with evidence that, in fact, market abuse was rare, if not non-existent. The ICC noted that "the present record identifies no commodity moving chiefly by boxcar on which rate levels are now being controlled by Commission maximum rate prescriptions rather than by market forces." *Boxcars I*, 367 I.C.C. at 440; *see also* Brief for Respondent at 54-55 & n.29 (claiming that there is only one case since the passage of the 4-R Act in 1976 in which the Commission found either market dominance or charging of an unreasonable rate by a railroad for boxcar transportation of freight). It also

retained jurisdiction to require reciprocal switching and joint use of terminals allowing one carrier to use another carrier's routes and other facilities, *see Boxcars I*, 367 I.C.C. at 433 n.20, and promised to modify or revoke the exemption of maximum rate regulation if "the exemption does not work as planned." *Boxcars III*, slip op. at 4. Finally, the Commission considered the Conrail and DOT studies, which it found further supported a conclusion that railroads did not have market dominance.

3. *The Conrail study*

This brings us to petitioners' major attack on the Commission decision, which focuses on the study of railroad/truck market shares and r/vc submitted by Conrail. Petitioners argue that this study, upon which the ICC heavily relied, does not rationally support the Commission's "finding that railroads could not abuse their market power with respect to 'any' commodity transported by boxcar" because the data it reports are too aggregated to justify such a conclusion about particular commodities. Joint Brief for Petitioners at 61-62.

Petitioners point to differences in the types of boxcar services required for different commodities, and contend that each of the commodity groups in the study represented several, rather than a single, market for transportation. For example, commodities like certain automobile parts require boxcars with special racks that make these cars unsuitable for transportation of other goods. According to petitioners, these special parts comprise a distinct transportation market that the ICC should have looked at separately. *See Boxcars I*, 367 I.C.C. at 436. Petitioners claim that railroads enjoy high market shares and r/vc in many of these submarkets. Because the data from these submarkets are averaged with data from submarkets where railroads have very little market share and low r/vc, they argue, the aggregated data of the Conrail

study masks significant potential for railroads to abuse market power.

Petitioners cite *Chesapeake and Ohio Railway* v. *United States*, 704 F.2d 373 (7th Cir. 1983). In that case the Seventh Circuit rejected the ICC's reliance on aggregated data about through routes as arbitrary and capricious. In *Chesapeake* the ICC had granted Conrail's petition to cancel several thousand joint rates under 49 U.S.C. § 10705(e) based on a study Conrail submitted showing that cancellation of all routes, in the aggregate, would result in an average reduction of transit time for the routes remaining open. *Chesapeake* held that the aggregated data was not sufficiently probative of the efficiency of individual routes for the court to conclude that substantial evidence supported the cancellations as being in the "public interest." *Id.* at 379.

The statutory scheme of section 10505(a) nonetheless leads us to conclude that the ICC's reliance on the Conrail study was justified. In the Staggers Act, Congress amended this provision explicitly to authorize Commission exemptions from regulations that are not limited in scope. *See Conference Report, supra* at 104-05, 1980 U.S. Code, Cong. & Ad. News at 4137. It explained this change in the Staggers Act conference report:

> The conferees expect that, consistent with the policies of this Act [the Staggers Act], the Commission will pursue partial and complete exemptions from remaining regulation. The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose. Particularly the conferees expect that as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing

carrier actions after the fact to correct abuses of market power.

Conference Report, supra at 105, 1980 U.S. Code, Cong. & Ad. News at 4137. Thus, Congress encouraged the Commission to apply its exemption authority under section 10505(a) in a manner of "general applicability," and therefore "it is not a condition of [the] validity [of such an exemption] that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable." *United States* v. *Alleghany-Ludlum Steel*, 406 U.S. 742, 749 (1972) (quoting *Assigned Car Cases*, 274 U.S. 564, 583 (1927)).

Of course the evidence that the Commission does consider must be probative of the findings it is required to make as part of its exemption decision and the Commission must explain why more probative evidence, if available, was not collected. Here the ICC claimed that a commodity-by-commodity approach would involve thousands of commodities and was not feasible. *See Boxcars I*, 367 I.C.C. at 436. At argument counsel for petitioners stated that it did not expect the Commission to do a commodity-by-commodity study, but that the study should have grouped commodities according to their transportation characteristics. We do not believe the Commission's commodity groups were inappropriate even when viewed, as petitioners suggest, in terms of transportation characteristics. Although aggregated data is imperfect, it is reasonable to assume that there is some correlation between types of commodities and transportation-related attributes of the goods. For example, we expect that cars that carry different types of auto parts are more likely to be interchangeable with each other than either is with cars that carry grain products, and the routes that auto parts travel are more likely to overlap with each other than either is with the routes that grain products travel. Thus, the Commission did not act arbitrarily and capriciously in concluding that the Conrail study "divided box-

car commodities into reasonably related groups under a standard classification system." *Boxcars I*, 367 I.C.C. at 436.

Nor do we believe that *Chesapeake*, 704 F.2d 379, mandates a reversal of the ICC decision here. The *Chesapeake* court reviewed a decision to cancel particular (albeit numerous) through routes under 49 U.S.C. § 10705(e). That section envisions a more circumscribed ICC decision based on an evidentiary hearing focusing on the particular through routes of particular parties. Information therefore that may be of little probative value with respect to a particular route, may be highly probative for the purposes of a policy decision of general applicability, such as the one Congress envisioned, and the ICC here effectuated under section 10505(a). Additionally *Chesapeake* noted that even the aggregate data submitted in that case was probably meaningful enough for Conrail to meet its initial burden of production under section 10705(e). The court did not so find only because the aggregated data "was built up from individual through route comparisons [and] Conrail easily could have presented the data underlying those comparisons along with the summary statistics[;] . . . the burden of production would not have been greater . . . ." *Chesapeake*, 704 F.2d at 379. In *Chesapeake*, the Commission could not give any reason why the full study was not included in the administrative record. In this case the Commission concluded that presenting meaningful less-aggregated data would impose an impossible burden time and energy-wise, *see Boxcars I*, 367 I.C.C. at 436, and petitioners point to no record evidence undermining this conclusion. We thus conclude that ICC reliance on the aggregate data of the Conrail study was not *per se* arbitrary and capricious.

Petitioners who assail the Conrail study because it is limited to rail transportation to, from, or within the Northeast. They argue that the attributes of freight

transportation markets in other regions of the country are sufficiently different from those in the Northeast to render the ICC's conclusions about national rail transportation based on this data arbitrary and capricious. The ICC, however, did not consider the Conrail data in isolation; it relied on many other factors, most importantly a Department of Transportation (DOT) nationwide study done in 1977. In addition one of the petitioners itself submitted comments indicating that Conrail's data was representative of the whole country. *See* J.A. 1418-21. The Commission thus had before it nationwide data as well as that from the Northeast and indications that the Northeast data was representative of the whole country. It therefore had a basis for informed judgments about boxcar freight transportation markets throughout the country.

4. *Particular commodities*

The conclusion that the ICC did not err in relying on the Conrail data does not, however, completely put to rest the challenge to its finding that rate regulation is not needed to prevent abuse of market power, since the Commission must consider all relevant factors in the comments it receives. Petitioners submitted evidence demonstrating that four commodity groups—auto parts, paper and forest products, grain, and metals—included submarkets for transportation within which railroads had high market shares and in one case were earning sufficiently high r/vc to subject them to regulation. For these commodity groups the Conrail study would not be enough to support the Commission's conclusion on market abuse since its aggregated data cannot refute this more specific evidence submitted by petitioners. In every one of these potentially problematic groups, however, the ICC considered record evidence independent of the Conrail study and concluded that railroads had no market dominance or otherwise were not in a position to abuse market power within any commodity group.

The petitioners argue that the Commission ignored evidence they submitted tending to show market dominance in certain submarkets. *See* Joint Brief for Petitioners at 75-82. While we agree that there is some evidence in the record tending to support their contentions about market power as to certain commodities, we do not find it, on review, compelling enough to render the Commission decision arbitrary and capricious. It is not our function to secondguess the ICC on factual matters. *See Alleghany-Ludlum Steel*, 406 U.S. at 749 (reviewing court is not to weigh the evidence before the Commission). The ICC, in its decision, drew on evidence of such factors as transportation alternatives, trends in the transportation of these commodities, shipper market power, etc., from which it was reasonable to conclude that railroads either do not dominate these submarkets or could not abuse any market power they did have. *See Boxcars I*, 367 I.C.C. at 436-40. Thus, despite the lack of the Conrail study's probativeness for the four potentially problematic groups, the ICC had ample record evidence supporting its conclusions as to rail carriers' market power over transportation of commodities within these groups.

5. *Conclusion as to rail carriers' market power*

In sum, we conclude that the ICC did not act arbitrarily and capriciously in finding that rail carriers did not have monopoly power in the market for transport of commodities shipped by boxcars. We are relying as well on the Commission's position that its authority to revoke the exemption is an appropriate mechanism to correct any post-exemption market abuse. *See Boxcars I*, 367 I.C.C. at 440-41. This court has previously endorsed such an approach in approving promulgation of general rules, *see, e.g., The Process Gas Consumers Group* v. *United States Department of Agriculture*, 694 F.2d 728, 745-46 (D.C. Cir. 1981); *adopted en banc*, 694 F.2d 778, 783 n.3 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 1874 (1983), and we believe it especially appropriate here for three reasons.

First, the ICC considered substantial evidence about particular commodities as well as commodity groups without finding any monopoly power by railroads. Second, Congress itself envisioned after the fact review to correct isolated market abuses that may follow the lifting of protective regulations under section 10505(a). *See Conference Report, supra* at 105, 1980 U.S. Code, Cong. & Ad. News at 4137 ("conferees expect . . . that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power"). Finally, counsel for the Commission assured us at argument that the ICC would seriously consider revocation of the rate exemption and investigation of the boxcar freight rates charged any shipper upon a demonstration that the shipper had no meaningful transportation alternatives and r/vc for the rail carrier was sufficiently high to subject the rate to the Commission's jurisdiction. In the absence of a showing by petitioners that the railroads enjoy such market power over the transport of any specific commodity, and assured by the Commission that it will likely revoke the exemption with respect to any such commodities later identified, we refrain at this juncture from disturbing the exemption of boxcar traffic from maximum rate regulation.

C. *The Scope of the Maximum Rate Exemption*

Petitioners argue that because this exemption was so much broader than those previously adopted by the ICC, the Commission must therefore explain why it chose to proceed in the sweeping manner it did. *See* Joint Brief for Petitioners at 82-83. As previously stated, we believe that where Congress itself finds that generally continued regulation is unnecessary and anticipates deregulation of the entire railroad industry to the maximum extent possible in conformity with the national rail transportation policy, the Commission need not make an exquisitely detailed showing of why the broad scope of its exemption was proper. In this case the Commission noted that "the

premise of both the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) [, Pub. L. 94-210, 90 Stat. 31 (1976),] and the Staggers Rail Act of 1980, [Pub. L. 96-448, 94 Stat. 1895 (1980)] was that trucking competition had rendered continued railroad regulation, to a large degree, both undesirable and unnecessary." *Boxcars I*, 367 I.C.C. at 427. It relied on this premise and the fact that "the typical boxcar commodity is . . . the same type of commodity that is typically transported in motor carrier van trailers." *Id.* at 433. It was quite reasonable then, for the Commission to conclude as it did that a commodity-by-commodity approach would be unnecessarily burdensome.

One petitioner, the Port of Oakland, however, attacks the ICC's authority to exempt all boxcar traffic, claiming that this exemption covers more than "a person, class of persons or a transaction or service," the terms Congress used in section 10505(a). *See* Supplemental Brief of Petitioner Board of Port Commissioners at 8-9. The Port attempts to set up a distinction between a "service," which the ICC can exempt from regulation, and a "transportation," which the Port argues includes non-service activity that the ICC cannot exempt. The Port points to the Interstate Commerce Act's (ICA) definition of "transportation" to support this distinction. The ICA defines

> "transportation" [to] include—
>
> > (A) . . . equipment of any kind related to the movement of passengers or property . . .
> >
> > (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(25). The Port argues that the blanket exemption of boxcar transit is not an exemption of a "service" because, under that definition, a service involves activity ancillary to the movement of freight, but does not

include the actual movement itself. Because the boxcar exemption involves rates for movement of freight, the Port says it is an exemption of "transportation," which it sees as a much broader classification than the "service" alluded to in section 10505(a).

We find the Port of Oakland's position also to be without merit. At the outset we note that the ICA does not separately define "service." While the ICA definition of "transportation" is broken down into "equipment" related to the movement of freight and "services" related to that movement, it is actually silent as to whether the movement of freight is itself a "service." On the other hand, the legislative history makes it quite clear that Congress envisioned exemptions of movements, like that here, under section 10505(a). The House report on the Staggers Act explicitly approved the ICC's efforts under the narrower pre-Staggers Act exemption provision to exempt "the carriage of fresh fruits and vegetables . . . and . . . trailer-on-flat-car traffic" from regulation. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60, *reprinted in* 1980 U.S. Code, Cong. & Ad. News 3978, 4005. Neither fruit and vegetable transport nor TOFC traffic fit into the Port's narrow interpretation of the term "service."

We are supported in our reading of section 10505(a) as authorizing exemption of boxcar carriage by *American Trucking Associations*, 656 F.2d at 1120-21, which affirmed the ICC's exemption of TOFC carriage from all regulation under section 10505(a). The Port argues that the TOFC exemption was within the ICC's authority only because Congress specifically authorized exemptions of intermodal transportation in 49 U.S.C. § 10505(f). But *American Trucking Associations* viewed the special treatment of intermodal transportation in section 10505(f) as a clarification that such exemption of such transportation is authorized by the general provision of section 10505(a), and it specifically relied on the latter section as "the source of the Commission's authority to grant

[the TOFC] exemption . . . ." *Id.* at 1120. Given the ambiguity of the language of section 10505(a) in the face of its clear legislative history, and given further the persuasive view of the Fifth Circuit in *American Trucking Associations*, we hold that the Commission acted within its lawful authority in exempting freight boxcar rates from regulation.

III. JOINT RATES AND THROUGH ROUTES

In exempting boxcar transit from rate regulation, the Commission also exempted railroads from the statutory provisions dealing with "joint rates" charged for boxcar service over "through routes." *See* 49 U.S.C. §§ 10705, 10705a, 10707. A through route is one in which two or more rail carriers participate with each carrier transporting a shipment over part of the route. A joint rate for that through route is a single rate charged by the carriers that together carry a shipment over the route. "In contrast to 'combination rate' service, in which each carrier collects its charges separately, in 'joint rate' service, the delivering carrier bills and collects for all participating carriers and payments are divided among the participants according to a 'division' formula [that the participants agree upon prior to setting the joint rate]." *Ford Motor Co.* v. *ICC*, 714 F.2d 1157, 1159 (D.C. Cir. 1983).

Prior to the ICC exemption, two statutory provisions governed modification and cancellation of joint rates for boxcar transit. *See* 49 U.S.C. §§ 10705, 10705a. If a carrier elects to modify or cancel a joint rate under section 10705(e), it has to file its new tariff or cancellation 10 or 20 days prior to the effective date of the change, *see* 49 U.S.C. § 10762(c)(3), and the Commission reviews the filed tariff or cancellation to ensure it complies with the ICA (as amended). *See* 49 U.S.C. § 10707. As this court previously noted, a carrier proceeding under section 10705(e) "takes the chance that the ICC might suspend

[the tariff] under section 10707." *Southern Railway Co.* v. *ICC*, 681 F.2d 29, 32 (D.C. Cir. 1982). If the ICC does suspend the tariff, the filing carrier has to show, in a full evidentiary proceeding, that the change or cancellation of the joint rate is in the public interest.

If the carrier elects to proceed under section 10705a, upon 45 days notice, *see* 49 U.S.C. § 10705(a)(f)(2), it can add a surcharge to or cancel a joint rate if its revenue from the joint rate is less than 110% of the variable cost of providing service over its portion of the route. *See* 49 U.S.C. § 10505a(1)(A). The carrier, however, has no right under section 10705a to impose a surcharge in such a manner that it receives more than the 110% threshold figure, or even to cancel a rate if its co-participant counters with a revenue division that ensures the cancelling carrier a 110% return. If it tries to do so, the Commission either *sua sponte* or upon protest by other participating carriers may impose a new joint rate that grants the surcharging or cancelling carrier his 110% return. *See* 49 U.S.C. §§ 10705a(a)(2); 10705a(c)(2), (3), (6). In addition, section 10705a provides special protections for class III railroads that include the right to challenge a surcharge or cancellation as adversely affecting competition. *See* 49 U.S.C. § 10705(i(1). If the Commission determines that the public interest requires a return below the 110% threshold to avoid anticompetitive action and to maintain service on the route, it may order the carrier to provide such unprofitable service. *See* 49 U.S.C. § 10705(i)(2).

Since the exemption went into effect, carriers have been free to cancel or modify joint rates for boxcar transport as they see fit. They thus have been relieved of any obligation to provide prior notice of changes and to file changes with the ICC. In addition, to the extent sections 10705(e) and 10705a give other participating carriers a right to challenge changes in joint rates, the exemption extinguishes such rights. In short, while sections 10705

(e) and 10705a give carriers "no unfettered right of immediate joint rate cancellation [or modification]," *Southern Railway*, 681 F.2d at 34 n.11, the exemption gives them precisely such a right.

A. *The Commission Decision*

The ICC briefly discussed the exemption of joint rates from regulation in its initial decision. It responded to comments that joint rate exemption would allow elimination of joint rates and closing of through routes in derogation of the national rail transportation policy "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers . . . ," 49 U.S.C. § 10101a(4), and "to foster sound economic conditions in transportation . . . ," 49 U.S.C. § 10101a(5). The Commission first noted, "[t]here is no reason to expect that an exemption would lead to cancellation of all joint boxcar rates." *Boxcars I*, 361 I.C.C. at 444. It reasoned that a carrier would have no incentive to "insist on a division of profits so disproportionate as to force the other [carriers] to withdraw from the movement . . . [as that would] forfeit the traffic for [all participating] carriers." *Id.* In the next paragraph, however, it essentially admitted that such incentives exist since "route closings might occur if a carrier wishes to close routes that involve long hauls over the lines of connecting railroads in order to concentrate traffic on routes that involve long hauls over its own lines." *Id.* In essence, the Commission recognized that where a carrier's own route competed with the through route it might benefit from closing the through route since that would reduce intramodal competition. The Commission dismissed this possibility by a single cryptic remark that "[n]onetheless, it is unlikely that a carrier acting in an economically rational manner would close efficient routings." *Id.*

In its decision denying reconsideration of the boxcar exemption, the ICC again addressed the exemption of

joint rates from regulation. *See Boxcars II*, 367 I.C.C. at 753-54. There the Commission focused on the concerns of class III carriers that the exemption was inconsistent with the protections for small railroads contained in 49 U.S.C. § 10705a, which allows carriers under limited circumstances to add surcharges to or cancel joint rates.

The Commission first stated that its joint rate exemption did not open small railroads to abuses against which 49 U.S.C. § 10705a protected. It noted that section 10705a was merely a shortcut to allow railroads that can support certain claims of nonprofitability to quickly impose a surcharge on or cancel particularly unprofitable joint rates. The ICA (as amended) provides an alternative ground for a carrier to cancel joint rate that the carrier can show is not in the public interest. *See* 49 U.S.C. § 10705(e). The ICC pointed out that under this provision, a carrier could cancel almost any inefficient or unprofitable rate, and reasoned that the exemption of joint rate regulation merely allowed such cancellations to occur without administrative delay and expense. *Boxcars II*, 367 I.C.C. at 753 & n.23. The Commission also noted that the specific provisions of section 10705a do not prevent the exemption of joint rates from regulation. *Id.* at 753. The whole point of the exemption provision was to eliminate the requirements of such provisions once the ICC shows they neither further rail transportation policy nor protect shippers from market abuse.

The Commission went on to explain why it believed the joint rate exemption would not harm class III carriers. It stated:

> Boxcar traffic is especially subject to diversion to other modes and consequently will not bear excessive rate increases. What matters to the shipper is the origin-to-destination rate, not the size of the connecting railroad of origin or destination. In other words, after excessive rate increases on boxcar traffic, diversion would take place regardless of whether

> the traffic moved jointly with a class III railroad or moved solely on a class I [*i.e.*, large] railroad. This gives long haul class I railroads an incentive to hold down rates that they would charge for transportation to junctions with class III carriers in the absence of joint (single factor) rates for the origin to destination movement.

Boxcars II, 367 I.C.C. at 753-54. In essence, the Commission noted that intermodal competition puts some cap on the rate a large carrier will set for its portion of transit in which a small carrier also participates. The Commission further reasoned that the exemption of boxcar traffic generally would attract boxcar traffic from shippers, and the benefits of this increased traffic would inure to small and large carriers alike. *Id.* at 754.

In *Boxcars II*, the ICC also repeated its assertion that large carriers would cancel only inefficient routes, this time explaining that "[c]arriers cannot afford the luxury of preserving inefficient routes when competitive pressures force them to reduce costs as much as possible." *Id.* at 754. The ICC was satisfied that the exemption was consistent with the rail transportation policy because it would result in no cancellations of efficient through routes.

The ICC revisited the joint rate exemption one final time in *Boxcars III*. There it briefly repeated, without elaboration, its determinations that carriers will not cancel efficient joint routes, and that therefore small carriers will not suffer from the joint rate exemption. *Boxcars III*, slip op. at 6.

B. *Carrying Out the Rail Transportation Policy*

Petitioners contend that before the ICC concludes that a particular provision of the ICA is "not necessary" to carry out the rail transportation policy at 49 U.S.C. § 10101a, it must consider why Congress adopted the provision in the first place. *See* Joint Brief of Petitioners at 37. They claim that the Commission did not adequately

consider the balance Congress struck in section 10705a, "a key objective of which was to protect small railroads against anticompetitive actions by large carriers." *Id.* at 38. At least in this case we believe that the Commission must consider the relationship between section 10705a and the national rail transportation policy as well as the exemption provision invoked here. Such consideration is mandated by the Staggers Act itself which requires the ICC to consider whether regulation is needed to further the transportation policy set out in the Act. Additionally, the legislative history shows that section 10705a, adopted at approximately the same time and as part of the same Act which contains both the transportation policy in section 10101a and the exemption authorization in section 10505a, was specifically designed to address one of the components of the rail transportation policy set out in section 10101a, *i.e.*, "the development . . . of a sound rail transportation system . . . ." The Commission counters that it has indeed considered the interests of small railroads and concluded that large carriers will not divert traffic from efficient through routes in which small carriers participate. It further asserts that this is all the rail transportation policy requires. We find, however, that the legislative history of these three provisions clearly demonstrates that Congress anticipated that the ICC would engage in a far broader and more thorough inquiry into the need for continued joint rate regulation before granting a total and unconditioned exemption of joint rates from any oversight or regulation.

1. *Incentives for large carriers to close efficient routes*

The first problem with the ICC joint rate exemption is the Commission's failure to adequately explain its crucial assertion that large long-haul carriers will not close off efficient routes of small short-haul carriers. After admitting that large carriers have an incentive to close off efficient competing routes to gain monopoly power over

a haul from a given origin to a given destination, it simply dismissed this possibility as unlikely. 367 I.C.C. at 444. Such bald assertions do not qualify as reasoned decisionmaking. The government's brief, attempting to fill this reasoning gap, explained that in such a monopolization situation where "a carrier seeks to foreclose a smaller carrier from markets it [the small carrier] could serve as part of an efficient route, antitrust remedies are available." Brief for Respondent at 63. The ICC itself, however, nowhere mentioned antitrust remedies either as a deterrent to such monopolizing or as an after-the-fact remedy that would correct such abuses by large carriers. We therefore must reject the argument in the government's brief as a post hoc rationalization of counsel and not the Commission's reason. *See Airbags*, 103 S. Ct. at 2780.

Even if we attended counsel's argument, however, our perusal of the legislative history of the Staggers Act creates doubt that merely noting the existence of the antitrust laws sufficiently satisfies the Commission's statutory burden of making a finding that large carriers will not try to drive class III railroads from providing service over efficient routes. Under pre-Staggers Act law, the Commission had authority to investigate *all* joint rate changes and cancellations in order to ensure they were in the public interest. *See Southern Railway*, 681 F.2d at 33-34 & n.11. Presumably, cancellations that significantly reduced competition over a particular haul would not be approved. When Congress enacted section 10705a, which took away the Commission's authority to review certain joint rate cancellations, it was careful to preserve a mechanism by which class III railroads could challenge the cancellation before the Commission as anticompetitive. It did so "to avoid the need and burden of complex litigation that might arise out of the need for class III carriers to resort to the antitrust laws, although an available alternative, if they feel a carrier is engaging in anti-

competitive activities." H.R. Rep. No. 1035, 96th Cong., 2d Sess. 64, *reprinted in* 1980 U.S. Code, Cong. & Ad. News 3978, 4009. It is thus clear that Congress itself rejected the mere existence of antitrust remedies as a justification for removing the Commission's authority to review joint rate cancellations.

We do not mean to suggest that the antitrust remedies are therefore irrelevant to the Commission's inquiry into the need for joint rate regulation. If the Commission had, for example, shown that the types of monopolistic practices which the joint rate exemption might permit are in fact antitrust violations not likely to result in suits involving difficult questions of proof and long drawn out trials, antitrust remedies might negate the need for continued regulation. But neither the ICC nor its counsel made any such showing which would convince us that it considered factors beyond those which Congress clearly thought insufficient to justify deregulation of joint rates.

2. *Division of joint rates*

The second and even more fundamental problem with the ICC's finding that regulation of joint rates is not needed to carry out the rail transportation policy is the Commission's assumption that the policy is satisfied as long as efficient routes are not cancelled or forced out of service. The ICC apparently conceded that large long-haul carriers may have monopoly power over small short-haul carriers where the only alternative to the through route involving the small carrier is via the large carrier lines.[1] *See Boxcars I*, 367 I.C.C. at 444; Brief for Re-

[1] This apparent concession is not inconsistent with the Commission's general determination, affirmed above, that railroads do not have monopoly market power vis-a-vis shippers. The latter finding is addressed only to the existence of undue monopoly power stemming from the lack of competitive alternatives for shippers; it does not encompass an assumption that rail transportation operates in a perfectly competitive market where all railroads' costs (including reasonable returns on

spondents at 63 & n.39. It then reasoned that this poses no threat to the smaller carrier, at least insofar as its routes are more efficient than the large carrier's competing routes, because the larger carrier can make more profit by purchasing the service from the small carrier at a price below its own cost. *See* Brief for Respondent at 63 n.39. The ICC, however, totally ignored the division of profits likely to result in such a situation in the absence of joint rate regulation. At argument, counsel for the petitioners pointed out that the large carrier could, and probably would, use its monopoly power to usurp profits that the smaller carrier deserves because it has the more efficient route. It seems self-evident to us that such use of monopoly power by large carriers to usurp the efficiency gains of the smaller carrier would not comport with the rail transportation policy of 49 U.S.C. § 10101a.

One of the key goals of the rail transportation policy is "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers." 49 U.S.C. § 10101a(4). Representative Madigan, a sponsor and floor manager of the Staggers Act, in discussing the joint rate and surcharge and cancellation provisions, emphasized that this goal applied to small railroads as well as struggling large railroads like Conrail:

> One of the major purposes of this bill [the Staggers Act] is to encourage the Development of short line and feeder line railroads. Therefore we were par-

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capital) equal their revenues. In other words, the finding of no monopoly power vis-a-vis shippers does not, as the Commission itself reasoned, mean that railroads generally are not in a position to reap and divide among themselves the rewards of their operating efficiencies where such efficiencies exist. We address in this section Congress' concern that such deserved rents be fairly appropriated between large and small carriers participating in through routes.

> ticularly careful not to do anything which would cause economic hardship to existing short line railroads.

126 Cong. Rec. H5902 (daily ed., June 30, 1980). Congress further recognized that "the matter of [joint rate] divisions is extremely significant to the financial health of individual carriers and groups of carriers operating in various regions of the country." S. Rep. No. 470, 96th Cong., 2d Sess. 9-10.

The Commission's response that large carriers have no incentive in the short run to drive more efficient small carriers out of business simply fails to address Congress' concerns that rail carriers receive enough revenue to pay for efficiency increasing improvements and to encourage further investment to keep the rail system healthy. A small railroad whose profits are kept to the bare minimum, by a large carrier to which it is captive, may have little incentive or even capability to make efficiency increasing improvements: even if it could afford them, any increased profits it obtained from such improvements would run the risk of being gobbled up by the profit maximizing large carrier. Thus, while the ICC demonstrated that the joint rate exemption would not result in the short run destruction of short line railroads, it did not even allude to Congress' other main concern, *i.e.*, that the division of revenue in joint rates would be such as to encourage improvements in the system, and that joint rate regulation was not needed for the long-term health of the national rail system.

The precise problem that the ICC ignores was identified by Representative Lee, as the basis of provisions he introduced into section 10705a explicitly to protect short line railroads. He stated:

> Most of my attention has been directed to section 301, joint rate surcharge and cancellations, because that is the area where there is room for the greatest mischief. I want to be clear, however, that it is our

intent to promote development of class II and class III carriers and other sections of this legislation are not to be used by the Interstate Commerce Commission or any other entity in a fashion that intends an adverse impact on one or more class II or class III carriers. . . .

As a general guideline, I will cite some examples of the kinds of actions that would not be acceptable as tools against class II and III railroads by class I carriers. In this bill we broaden the exemption clause creating a simpler standard. *In no case should the exemption clause be allowed in a circumstance that would allow a large carrier to utilize its market power to squeeze a smaller carrier on a joint rate or division* or to force a de facto cancellation. In other words the exemption clause should never be used to "end run" the joint rate provisions contained in section 301. . . .

The above examples are by no means a complete list. Simply put, we do not intend that the various sections of this legislation be used so that the expanded power and flexibility given large carriers can be applied against class II and class III carriers in an adverse fashion that would impair a smaller carrier's ability to attain financial health.

126 Cong. Rec. H8553 (1980) (daily ed. Sept. 9, 1980) (emphasis supplied). In light of Congress' unquestionable concern that large carriers might unfairly squeeze profits from captive small carriers, we find the ICC's total failure to address this highlighted issue renders inadequate its finding that small carriers will be protected in the absence of regulation.

There are additional components of the rail transportation policy set out in section 10101a which undergird our belief that the potential for abuse of monopoly power through joint rate divisions cannot be ignored by the ICC in deciding whether to exempt joint rates from regulation. The rail transportation policy, among other things,

aims "to prohibit predatory pricing and practices . . . and . . . unlawful discrimination," 49 U.S.C. § 10101a (13). This antidiscrimination policy was meant to provide safeguards against "predatory practices which constitute unfair competition. H.R. Rep. No. 1035, 96th Cong., 2d Sess. 54, *reprinted in* 1980 U.S. Code, Cong. & Ad. News 3978, 3999. Certainly, it is unfair competition for a large long-haul carrier to appropriate a captive short-haul carrier's joint rate profits that derive from the smaller carrier's efficiency by the threat of the larger carrier's monopoly power over the through route even if, as the ICC predicts, the large carrier allows the small carrier enough revenue to stay in business. Yet the ICC totally disregarded the potential for such misappropriation by focusing solely on whether the through route would, in the short run, remain open.

The rail transportation policy also "encourage[s] . . . the elimination of noncompensatory rates for rail transportation." 49 U.S.C. § 10101a(10). The Commission relied on this goal for compensatory rates—tying rail revenues from a movement to the costs of that movement—to justify its conclusion that cancellation of inefficient routes comports with the rail transportation policy. *See Boxcars II*, 367 I.C.C. at 754 & n.24. The Commission failed to recognize, however, that the goal of compensatory rates is a two-edged sword: it not only aims to allow railroads to cover the costs of a movement (including an adequate return on capital), but it also contemplates that railroads will not be allowed to gain disproportionate returns by use of monopoly power over that movement. In fact, it was just such a fear of dominant carriers' ability to use monopoly power to extract exhorbitant rates that inspired the inclusion of "the elimination of noncompensatory rates" as part of the rail transportation policy. The amendment which became subsection (10) was added to section 10101a on the House floor by Representative Eckhardt, who stated:

> the spirit of the Four-R Act [Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976)] was to encourage honest and efficient management of railroads and in particular the elimination of noncompensatory rates for rail transportation. It was not merely to give more money to railroads *or to permit railroads a greater leeway in charging all that the market would bear in a monopoly situation. . . .*
>
> It seems to me that we should make it absolutely clear in this act, in the policy section of the act, that we do not retreat from that proposition.

126 Cong. Rec. H6003 (daily ed., July 2, 1980) (explaining his amendment to include section 10101a(10) in the rail transportation policy) (emphasis supplied). We believe, accordingly, that the Commission cannot properly justify its decision as to joint rate exemption by relying exclusively on one edge of the compensatory rate goal—allowing carriers to cover their costs—while ignoring entirely the other edge—preventing monopoly carriers from charging rates that produce an unreasonable return for their costs.

Because, therefore, the ICC failed to fully consider the ability of large carriers to gain unfair joint rate divisions by using monopoly power over carriers whose participation in through rates is captive to this monopoly, we remand the rate exemption as it applies to joint rates.

It is perhaps useful at this point to offer a word of additional explanation as to the different conclusions we have reached on the ICC's justification for its general rate exemptions and for joint rate exemptions. With respect to maximum rate exemptions generally, the ICC acted broadly to deregulate a particular form of transportation on the ground regulation was not necessary to effectuate any transportation policy. We sustain that action on the basis of general transportation data in the record relied upon by the Commission, concluding that

the ICC need not prove its case on a commodity-by-commodity basis. At the same time, we rely on the ICC's admitted duty to monitor particular transportation markets and movements, and to correct abuses of market power brought to its attention after the fact. On the other hand, with respect to joint rates, we have found that even using the same broad lens for review, the ICC's basic decision is not supported by adequate consideration of relevant factors. *See ILGWU*, 722 F.2d at 822 ("agencies can [not] ignore important factors in making predictions"). The Commission, in its decision, must demonstrate that "it identified all relevant issues, [and] gave then thoughtful consideration duly attentive to comments received." *Telocator Network* v. *Federal Communications Commission*, 691 F 2d 525, 545 (D.C. Cir. 1982); *see also, Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Ritter Transportation Co.* v. *ICC*, 684 F.2d 86, 88 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 1272 (1983); *Action for Children's Television* v. *Federal Communications Commission*, 564 F.2d 458, 478-79 (D.C. Cir. 1977) (agency must take a "hard look" at the relevant issues). With respect to joint rates, the text and legislative history of the Staggers Act demonstrate that Congress thought a fair division of joint rates was an important means of carrying out the rail transportation policy. The Commission's total failure to consider the effect of joint rate exemption on this division was therefore arbitrary and capricious.

IV. Car Hire Decision

A. *Background*

The next focus of the Commission's *Boxcars* decisions is car hire—the rentals that boxcar owners (originating carriers) receive from the carriers that own the tracks over which the boxcars travel (destination carriers).[2]

[2] The categories "destination carriers" and "originating carriers" are not mutually exclusive. Because most carriers own

The car hire decision is the Commission's response to the presence of certain indicia of economic inefficiencies in the boxcar market. For example, railroads have inefficiently devoted substantial resources to the unnecessary movement of *empty* boxcars. Indeed, the movement of empty boxcars has increased despite a decrease in the movement of loaded boxcars: although loaded car-miles for boxcars decreased by 238 million miles in 1980, empty car-miles increased by 226 million miles for the same period. Reply Comments of Consolidated Rail Corp. Verified Statement of Professor Alain L. Kornhauser, Figure 12. Moreover, the current supply of boxcars exceeds the existing demand, possibly by a margin of 75,000 excess boxcars. *See* Commission Brief at 8. From 1970 to 1980, the size of the national boxcar fleet *increased* by seventy-two percent even though the number of boxcar loadings *decreased* by four percent. Comments of Consolidated Rail Corp., Vol. I., Verified Statement of Emmitt Posey at 9. *See also Boxcars I*, 367 I.C.C. at 452. And finally, there is some evidence that the car hire rates received by boxcar owners can continue to rise, at least theoretically, during periods when there is a surplus of cars. *Boxcars I*, 367 I.C.C. 448 & n.43.

Prior to the *Boxcars* decisions, the originating carrier received car hire (also known as per diem) for each day that its boxcars were on the tracks of another carrier.

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some boxcars, today's destination carrier may be tomorrow's originating carrier.

Moreover, for the purposes of our discussion and analysis of this issue, we will follow the lead of the petitioners and of the Commission and will use the label "originating carriers" to designate carriers that *own* their boxcars and carriers that *lease* their boxcars from companies that are not carriers. Such a single classification reflects the fact that none of the petitioners argued, much less demonstrated, that, as regards boxcar movements, the economic incentives under discussion, *see infra,* would have a different influence on the decisions of carrier-*owners* than on the decisions of carrier-*lessees.*

The per diem formula adopted by the Commission distributed costs evenly over the days that the car was in use. The destination carrier, which had to permit the boxcars' access to its tracks, could not charge the originating carriers for the cost of moving the boxcars. The Commission justified this allocation of costs to the destination carrier on the policy that the destination carrier received substantial benefits, both direct and indirect, from the movement of loaded private boxcars over its lines, and that the car hire costs represented part of the expense of providing the transportation services required for the movement of freight. *See generally Indiana Harbor Belt Railroad Co. v. General American Transportation Corp.*, 577 F.2d 394, 398-401 (7th Cir. 1978).

The Commission's *Boxcars* decisions altered some aspects of the car hire structure. Not affected, however, was the basic underlying per diem framework; the destination carrier will continue to owe per diem for each day that the originating carrier's boxcars are on the destination carrier's tracks. Moreover, the Commission retained the power to establish per diem rates and to enforce mandatory interchange requirements, reciprocal switching requirements, joint terminal use requirements, and the railroad's common carrier obligations to supply boxcar equipment to shippers for loading upon reasonable request. *Boxcars I*, 367 I.C.C. at 454-55. The modifications nonetheless were significant.

The Commission authorized destination carriers to charge originating carriers a storage fee, beginning seventy-two hours after the boxcar is unloaded. This storage fee is designed to offset the car hire that would otherwise accrue during this period and accordingly may not exceed the comparable per diem charges. *Boxcars III* at 10 n.14. The Commission also allowed destination carriers to charge a fee, not exceeding thirty-five cents per mile, for the return of empty boxcars, when the originating carrier requests such return. *See, e.g., Boxcars I*,

367 I.C.C. at 451. This thirty-five cents figure, adjustable for inflation, represents the typical variable cost of handling an empty boxcar. *Boxcars I*, 367 I.C.C. at 451 n.46. Moreover, the Commission freed from all car hire regulations, including those adopted in the *Boxcars* decisions, carriers that enter bilateral agreements directed at the use, storage, and movement of boxcars. *Id.* at 451.

The Commission offered three principal justifications for its car hire decision. First, the Commission suggested that the car hire modifications will diminish incentives to haul empty boxcars and thus will promote the efficient movement of boxcars. The pre-*Boxcars* system, the Commission reasoned, had created incentives for originating carriers to load their own cars and to return the destination carrier's cars empty. Greatly oversimplified, if an originating carrier loaded its own car it could enhance its revenue by the amount of car hire received for the period that its car was off its lines. Any such benefit, of course, would be offset by the cost of hauling the destination carrier's boxcar empty. *See generally Boxcars II*, 367 I.C.C. at 755 & n.27. Under this scenario, the destination carrier was largely powerless to affect the originating carrier's loading decisions. The post-*Boxcars* system, the Commission found, will reduce these incentives. The primary assumption underlying this conclusion is that once the destination carrier is empowered to impose empty return charges and storage fees, the originating carrier, not wanting to pay these charges, will be more likely to enter into bilateral agreements. These agreements will then lead to the more efficient movement and use of boxcars. The Commission repeatedly emphasized that the purpose of authorizing the empty return fee and storage charge was to create an incentive for the originating carrier to enter such bilateral agreements, that the possibility that the destination carrier will impose such charges will prod originating carriers into entering agreements. *See, e.g.*, *Boxcars II*, 367 I.C.C. at 763.

The Commission, however, appreciated that bilateral agreements are not inevitable and that in some situations the storage fees and empty return charges will be more than an idle threat. In those situations, the Commission reasoned, the originating carrier will attempt to avoid the new charges by returning the destination carrier's cars loaded instead of using its own cars. Yet even if the originating carrier can take no steps to enhance the efficiency of boxcar movements (i.e. if there are no boxcars belonging to the destination carrier available), these charges are proper, the Commission argued, since the costs of moving the originating carrier's cars should be borne by the originating carrier. "If the short lines [originating carriers] cannot or will not load returning foreign cars instead of their own cars which would then be returned empty, at least they should pay for the empty returns that their practices necessitate." *Boxcars II*, 367 I.C.C. at 763. As the Commission's counsel indicated at oral argument, the originating carrier could thus internalize its costs and, presumably, could make more efficient economic decisions.

The Commission also argued that its "new" system of car hire will help eliminate the current boxcar surplus since the "old" system had created "at least the illusion of a guaranteed return on investment, encouraging investors to acquire cars without regard to the adequacy of the existing car fleet." *Id.* at 756. The new car hire package allegedly will erase this "illusion" of guaranteed returns.

B. *Analysis*

Petitioners raise several challenges to the Commission's car hire package. The petitioners argue that the car hire "exemption" contained in the *Boxcars* decisions is, in fact, not an exemption and that the Commission therefore exceeded its authority under section 10505(a); that the car hire "exemption" violates that statutory provision

which addresses the compensation levels for the use of boxcars, 49 U.S.C. 11122 (Supp. V 1981) (*see infra*); and that the Commission's findings that the rules will yield substantial benefits are unsupported in the record. We agree with petitioners' first argument and thus do not need to reach the other car hire issues.

Petitioners vigorously argue that the Commission exceeded its statutory authority under section 10505(a) and improperly adopted something akin to a new regulation. Significantly, the Commission initially shared the petitioners' concern that section 10505(a) was an inadequate basis for its car hire decision.

> Our order . . . is a partial exemption from regulation subject to conditions. We recognize, however, that it could be construed in some respects as being new regulation. To allay any doubt about the sufficiency of section 10505(a) as authority for our approval of Conrail's modified proposal, we shall take this action also under section 11122.

Boxcars I, 367 I.C.C. at 456. *See also id.* at 464 n.63 (Chairman Taylor, dissenting) ("This proposal, which will authorize the authority to assess charges at certain levels and to store empty cars while reclaiming car rental charges, is a regulation—not an exemption."). Section 11122, relied on by the Commission, addresses car hire rates and sets forth the factors that the Commission should consider in determining the level of car hire compensation.

> (a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include—
>
> (1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;
>
> (2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or

other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

49 U.S.C. § 1112 (Supp. V 1981).

In *Boxcars II*, however, the Commission realized that reliance on section 11122 would render its initial notice and comment procedures inadequate and thus, in apparent fear of jeopardizing its decision, disavowed any reliance on that section. *Boxcars II*, 367 I.C.C. at 759. For the remainder of its decisions, and in its representations to this court, the Commission has steadfastly emphasized that its car hire package is a "partial exemption from regulation subject to conditions." As the Commission explained:

> [The decision] is an exemption because it allows carriers to take actions that are inconsistent with the terms of compensation that we prescribe for freight car use under 49 U.S.C. 11122. The exemption is partial because it allows only specified types of departures from the prescribed terms. The exemption is subject to conditions in that carriers may not exceed certain limits in exercising it.

Id.

The Commission's argument that it is empowered to adopt either partial or complete exemptions from regula-

tions is clearly correct. That Congress intended the Commission to have this power is evidenced in the legislative history of the Staggers Act. For example, the House Conference Report provided: "The conferees expect that, consistent with the policies of this Act, the Commission will pursue *partial and complete exemptions* from remaining regulation." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4137 (emphasis added). *See also* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4005 ("a person or transaction may be exempted from *one or more* provisions of Subtitle IV") (emphasis added). Moreover, we previously have recognized that the Commission need not deregulate at one fell swoop. In *Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982), we noted: "Given the clear congressional intent to grant the Commission regulatory flexibility, we hold that the Commission has authority under section 10505 to order a partial exemption from Commission regulations . . . ." *Id.* at 334.

To hold that the Commission may grant either complete or partial exemptions pursuant to section 10505(a) is *not* to hold, however, that the Commission has unfettered authority under that section. The plain language of the statute reveals that Congress envisioned section 10505(a) as an avenue to *decreased* regulation. Indeed, section 10505(a) gives the Commission the power to *exempt* persons, services or transactions from regulations. Clearly, the plain meaning of the word "exempt" connotes a lessening of regulation, a decrease in regulatory burdens. *Cf. Maine Water Co. v. City of Waterville*, 93 Me. 586, 45 A. 830, 833 (1900) ("The term 'exemption' implies a release from some burden, duty, or obligation."); *Davidow v. Jenks*, 48 N.Y.S.2d 586, 588 (N.Y. Sup. Ct. 1944) ("Exempt means to release, discharge, waive, relieve from liability."). The notion behind deregulation is that parties should be allowed to work out

their economic relationships as they see fit, *free* from government oversight. In the absence of any contrary congressional intent, that plain meaning guides our decision. *See, e.g., Bread Political Action Committee v. FEC*, 455 U.S. 577, 580 (1982) ("'[a]bsent a clearly expressed legislative intention to the contrary, [the statutory language] must ordinarily be regarded as conclusive.'"); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944) ("[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."); *Inner City Broadcasting Corporation v. Sanders*, 733 F.2d 154, 158 (D.C. Cir. 1984) ("Unless contrary indications are present, a court can assume that Congress intended the common usage of [statutory terms] to apply.").

The legislative history of the Staggers Act strongly supports this reading of the word "exempt" and indicates that Congress envisioned the Act, in general, and section 10505(a), in particular, as empowering the Commission to *remove* regulations and to introduce market factors into the rail industry. In the Senate, Senator Cannon noted: "The emphasis in both [the Senate and House] bills is the *elimination* of needless regulation and greater reliance on the market place where there is effective competition." 126 Cong. Rec. S14002 (daily ed. September 30, 1980) (emphasis added). In the House, Congressman Florio, a leading supporter of the Staggers Act and floor manager of the bill, described the Act in the following terms: "We are trying to *deregulate.* We want the marketplace to make the determinations in the rail industry." 126 Cong. Rec. H8606 (daily ed. September 9, 1980) (emphasis added). And during the House's consideration of the Conference Report, Congressman Staggers noted that "[t]he exemption authority has been

carefully drafted to *limit* regulation to the bare essentials necessary to protect against abuses of market power." 126 Cong. Rec. H10085 (daily ed. September 30, 1980) (emphasis added). *See also id.* at H10083 (comments of Congressman Madigan) ("I should also point out that the conferees accepted the exemption provisions of the House bill which permit the Commission to *exempt from law or regulation* any of the regulated activities of railroads which it deems to be warranted in the future.") (emphasis added). *See generally* 126 Cong. Rec. H6409-12 (daily ed. July 24, 1980) (suggesting that the purpose of the Staggers Act is deregulation and not re-regulation).

That Congress envisioned section 10505(a) as authorizing deregulation is further evinced in the Conference Report.

> The policy underlying this provision is that . . . the Commission is more capable through the administrative process of examining specific regulatory provisions and practices . . . to determine where they can be *deregulated* consistent with the policies of Congress. . . . Particularly, the conferees expect that as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be *removed* . . . .

Conference Report, supra, at 105, 1980 U.S Code Cong. & Ad. News at 4137 (emphasis added).

We thus hold that the Commission's power under section 10505(a) is limited to the power to deregulate; to remove regulatory burdens and to allow the marketplace to influence decisions in the rail industry. This reading is supported by the plain meaning of the section and by its legislative history. Moreover, any other reading would give the Commission carte blanche to rewrite the Interstate Commerce Act under the umbrella of its exemption powers. That is, the Commission could invoke section 10505(a) as the authority both for exempting a section

and for then re-regulating the industry under a completely different format. This would clearly exceed the powers granted to the Commission under section 10505(a)

We thus squarely face the difficult issue of deciding whether the Commission's car hire actions constitute a permissible partial deregulation or an impermissible re-regulation under the guise of section 10505(a). When we direct our focus at the impact that the car hire decisions will have and at the objectives that the Commission seeks to achieve, we become convinced that the Commission here was *not* deregulating, but rather was imposing a new regulatory framework over the car hire relationship. Accordingly, we conclude that the Commission's car hire actions constitute an exercise of regulatory oversight that cannot be properly founded on section 10505(a). We therefore reverse the Commission on this issue.

In allowing storage charges and return fees the Commission, rather than merely deregulating, has altered the relative bargaining positions of the carriers and has influenced the allocation of the benefits that will flow from the cost savings associated with decreasing market inefficiencies. In its *Boxcars* decisions, the Commission, by its own admission, placed two significant bargaining weapons in the arsenal of the destination carrier. The destination carrier was empowered to impose these charges regardless of whatever other market factors might be present, and regardless of how those market forces might otherwise interact. At the same time, however, the Commission retained jurisdiction over the amount of per diem, and thereby limited the originating carrier's ability to increase the rate of per diem in those instances where that carrier otherwise would be in the dominant bargaining position. Thus, in a situation where the originating carrier would be in a relatively strong bargaining position under unadulterated market forces,

the Commission's car hire decision gives the destination carrier significant bargaining weapons and simultaneously deprives the originating carrier of the benefits it could receive under a system of complete deregulation. Thus, rather than leaving the contours of the car hire relationship to the market, the Commission skewed the initial economic relationship in favor of the destination carrier.

That the *Boxcars* decisions altered the relative bargaining positions of the parties, rather than redressing regulatory burdens, becomes evident when we focus on the initial position of each party as it enters negotiations. Prior to the *Boxcars* decisions, the originating carrier entered negotiations against a background in which it had, in essence, a statutory entitlement equivalent to the amount of the per diem. The destination carrier had no such entitlement and, in fact, confronted a situation in which, absent agreement, it would have to bear the cost of returning the boxcar. Under the *Boxcars* decisions, the originating carrier enters negotiations against a background in which it has a statutory entitlement equivalent to the amount of per diem. The destination carrier, however, now has a statutory entitlement equivalent to the storage fees and the empty return charges. In striking contrast, had the Commission actually deregulated car hire, then neither party would enter negotiations with a statutory entitlement and the market alone would establish the relative bargaining positions of the parties. It thus becomes obvious that the Commission has shifted entitlements to a point that represents neither deregulation nor the pre-*Boxcars* design. Thereby, the Commission has fixed the initial relative bargaining positions of the parties at a point that does not necessarily reflect either the pre-*Boxcars* scheme or what market factors otherwise might dictate.

Examined in this light, it is clear that the Commission's *Boxcars* decisions do not represent deregulation.

When Congress adopted section 10505(a) it surely envisioned the *elimination* of statutory entitlements, not the creation of new statutory entitlements, nor the affirmative rearrangement of old statutory entitlements. Simply, while section 10505(a) permits the Commission to deregulate, the Commission here dictated a substantial component of the initial economic relationship that will exist as the parties enter negotiations, regardless of the alignment of any other market factors. Accordingly, we must conclude that the Commission's actions cannot be characterized as a deregulation and thus cannot properly be founded on its authority under section 10505(a), the provision upon which it relied.

The Commission repeatedly attempts to deemphasize the significance of the storage fees and empty return charges on the grounds that the car hire provisions are just incentives to bargain. *See, e.g., Boxcars II*, 367 I.C.C. at 763 ("We would emphasize that the imposition of empty return charges is intended, not as the main tool of exemption, but only as a last resort when carriers do not reach agreements that otherwise reduce inefficient loading."). Granting destination carriers additional statutory entitlements vis-a-vis originating carriers under a scheme of continued regulation, however, does not metamorphize into a deregulatory exemption simply because it may encourage some carriers to enter bilateral agreements that will dictate the terms for the use, storage, and return of boxcars. Had the Commission's decision merely permitted bilateral agreements free from regulatory constraints, then this case, and its outcome, would be far different. Here, however, the Commission specifically maintained all existing car hire regulations and simply clothed the destination carrier with the additional power to impose the storage fees and empty return charges.

In addition to finding the Commission's reliance on the incentive to bargain rationale unpersuasive, we have problems accepting the underlying premise of the Com-

mission's assertion that the storage charges and empty return fees are in fact necessary to create an incentive to bargain. The Commission's premise is that the originating carriers will not enter agreements without these incentives. The Commission, however, reached this conclusion in face of evidence submitted by the petitioners that boxcar owners and originating carriers already are entering bilateral agreements with destination carriers. *See, e.g., Boxcars II*, 367 I.C.C. at 778 n.78 (Chairman Taylor dissenting). Moreover, in the absence of externalities, whose existence the Commission never even alluded to, there is no theoretical reason to believe that boxcar owners would not enter such agreements. Presumably, if there are inefficiencies creating unnecessary costs, the parties, inspired by the lure of larger profits, will negotiate to save these costs regardless of their initial bargaining positions. The Commission failed to address why this logical presumption does not hold in the car hire situation. We therefore cannot accept the ICC's assertion that the shift in statutory entitlements is necessary to create incentives for carriers to enter bilateral car hire agreements.

The car hire package strongly suggests to us that the Commission's car hire decision was motivated not by a desire to induce private agreements, but rather by a desire to reduce the current boxcar surplus by discouraging new investment. Throughout its discussion, the Commission suggested that its car hire package will influence boxcar investment decisions. *See, e.g., Boxcars I*, 367 I.C.C. at 453; *see also Boxcars II*, 367 I.C.C. at 773. By introducing market factors into car hire, the Commission contended, supply will be brought more into line with demand. *See, e.g., Boxcars II*, 367 I.C.C. at 773. But despite the Commission's broad statements of an intent to introduce market factors into car hire investment decisions, the car hire package itself suggests that the Commission was aiming at a particular result as regards boxcar investment decisions, *regardless* of how the market

might develop in the future. That is, by exposing boxcar owners to the possibility of storage fees and empty return charges while simultaneously prohibiting owners from freely setting car hire rates, the Commission severely reduced the attractiveness of boxcar investments. These disincentives to investments could continue indefinitely. To the extent that the *Boxcars* decisions were aimed at the particular result of discouraging boxcar investments —as opposed to merely allowing the market to establish the supply of boxcars—the Commission pursued a regulatory goal under the guise of deregulation. In other words, a decision to introduce certain measures into the marketplace to induce a particular desired response can hardly be characterized as deregulation.

The Commission's modification of the entitlements alternatively may have represented a policy decision. In fact, at oral argument the Commission's counsel maintained that the car hire modifications were proper because sound economic policy dictates that the originating carrier should internalize the costs of moving empty boxcars, even in those situations in which the originating carrier is powerless to correct the fact that empty boxcars need to be moved. (For example, where because of a geographic imbalance in trade flows, some empty cars will always have to be moved). That the car hire decision may represent a policy choice, however, only bolsters our conclusion that the Commission here in fact was not deregulating. Deciding which party should bear the cost of moving empty boxcars, regardless of market factors, is not the stuff of deregulation; section 10505(a) was not enacted as a means for the Commission to impose new regulatory policies on the railroad industries.

We thus hold that the car hire component of the *Boxcars* decisions is not a deregulatory action. Instead of allowing the market to determine the relationship between "suppliers" and "purchasers", the Commission embraced a system under which certain vital segments

of that relationship were fixed and predetermined, *regardless of market forces.* Accordingly, section 10505 (a), which only empowers the Commission to *deregulate,* does not provide the statutory authority for the Commission's actions here.

Our conclusion is further supported by the presence of another statutory section that could have provided an adequate basis for precisely the type of car hire provision contained in the Commission's *Boxcars* decisions. As the Commission itself acknowledged in *Boxcars I,* that other provision is section 11122, which addresses car hire rates, and empowers the Commission to adopt and implement car hire formulas. 49 U.S.C. § 11122 (Supp. V 1981) (reproduced *supra*). Thus, section 11122 could be an appropriate statutory foundation for the Commission's decision to redetermine the car hire relationship, as it attempted to do in its *Boxcars* decisions. That the Commission disavowed reliance on 11122 does not suggest that this section is inapplicable since the Commission's disavowal was motivated by procedural problems rather than substantive defects. *See Boxcars II,* 367 I.C.C. at 759 ("We agree that the *procedure* followed may raise substantive legal questions.") (emphasis added). Of course, were the Commission to act under section 11122, it would have to comport with the requirements imposed by that provision, *see generally Consolidated Rail Corp. v. United States,* 619 F.2d 988 (3rd Cir. 1980), and with any relevant administrative law restrictions. We intimate no opinion, however, as to whether the car hire rules promulgated in the *Boxcars* decisions would be appropriate under section 11122.

The Commission vigorously argues that the car hire components of its *Boxcars* decisions are nothing more than a permissible "partial deregulation subject to conditions." The Commission's primary support for this proposition is *Simmons v. Interstate Commerce Commission,* 697 F.2d 326 (D.C. Cir. 1982). We find that case in-

apposite. In *Simmons*, the Commission, pursuant to section 10505, granted a partial exemption to state governments proposing to operate abandoned rail lines. The Commission permitted state governments, through a modified certification procedure to start and terminate service without prior approval from the Commission. We upheld the Commission's action, reasoning that nothing in the statute prohibited partial deregulation or required the Commission to "first wholly exempt a party, after appropriate findings, and then make additional findings in a separate proceeding to revoke partially the previous exemption." *Id.* at 333. The Commission here argues that *Simmons* involved a "partial deregulation subject to conditions" similar to that which it adopted in the *Boxcars* decisions.

We find this argument without force. The Commission's action in *Simmons* was far different than the actions undertaken by the Commission here. In *Simmons*, the Commission eased the burdens that it previously had imposed on state governments wishing to operate abandoned lines. Nothing in that opinion suggests that the Commission's aim was anything other than the straightforward removal of burdensome regulations. Nothing suggests that the Commission had any intention of using the modified certificate procedure as a means to restrict market decisions or to superimpose a new regulatory framework over this area of rail transportation. *See, e.g., id.* at 343 ("The effect of the modified certificate program was to exempt states, or their operators, from the filing procedures and other restrictions contained in [certain provisions of the Interstate Commerce Act]."); *id.* ("These reasons led the Commission to conclude that full application of the [Interstate Commerce Act] to the states was not necessary to carry out the national transportation policy of section 10101(a)."). This is in marked contrast to the instant case.

Although the Commission did not rely on non-specific authority, we pause to note that the Commission's car

hire actions cannot be upheld under the Commission's "discretionary authority", which the Supreme Court recently has recognized, to take actions that are "legitimate, reasonable, and direct[ly] adjunct to the Commission's explicit statutory power". *Interstate Commerce Commission v. American Trucking Associations, Inc.*, 52 U.S.L.W. 4709, 4712-14 (June 5, 1984). At issue in *American Trucking Associations* was the Commission's inherent authority to implement remedies not specifically authorized by the Interstate Commerce Act. In essence, the Court found that the Commission, under certain circumstances, could "fill the gaps" in the Act because the "drafters of complex ratemaking statutes like the [Interstate Commerce Act] neither can nor do 'include specific consideration of every evil sought to be corrected.'" *Id.* at 4712 (quoting *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 308 (1953)).

In the instant case, however, section 11122 forecloses any possible statutory gap relating to car hire decisions. That is, section 11122 presents a distinct statutory provision with specific requirements that the Commission must satisfy when it chooses to impose a new regulatory format over the car hire relationship. As explained above, the Commission's car hire package, as now structured, constitutes the type of action that falls within the ambit of section 11122. Assuming *arguendo* that the Commission has discretionary powers adjunct to section 10505 (*American Trucking Associations* focuses on the Commission's discretionary authority in forming *remedies*), these discretionary powers surely do not allow the Commission to evade the explicit requirements of section 11122, requirements that directly address the car hire issue and that reflect a specific set of congressional concerns. In the face of section 11122, any discretionary power held by the Commission—a power upon which the Commission did *not* rely and which was mentioned neither in its *Boxcars* decisions nor in any representation to this court—does not authorize the utilization of its de-

regulatory powers as a means to achieve a new regulatory format.

Assuming, however, that the "discretionary power" analysis would be proper in this case, the Commission's actions still could not be upheld. As the Court noted in *American Trucking Associations*: "To lie within the Commission's discretionary powers, the proposed remedy must satisfy two criteria: first, the power must further a specific statutory mandate of the Commission, and second, the exercise of power must be directly and closely tied to that mandate." 52 U.S.L.W. at 4713. Here, the exercise of broad regulatory powers over the car hire relationship is not "directly and closely" tied to section 10505's mandate to deregulate. Because the Commission's actions cannot pass this nexus test, this case is distinguishable from *United States v. Chesapeake & Ohio Ry. Co.*, 426 U.S. 500 (1976), and *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), where the Court found that the Commission could condition its approval of proposed tariffs because the conditions furthered the objective of "just and reasonable" rates. *See, e.g., Trans Alaska Pipeline Rate Cases*, 436 U.S. at 653 (finding that the Commission, in suspending rates, can define a reasonable rate since any other result would require the carrier to "submit and resubmit tariffs until one finally goes below an undisclosed maximum point of reasonableness and is allowed to take effect."); *United States v. Chesapeake & Ohio Ry. Co.*, 426 U.S. at 514 (affirming ICC discretion to find a rate just and reasonable on the condition that extra revenues generated by the rate be applied to certain expenses). Accordingly, we conclude that even if a "discretionary power" analysis were proper in this case, the Commission's actions do not meet the standards necessary to invoke discretionary power.

In sum, we reverse the car hire components in the *Boxcars* decisions on the basis that the Commission here exceeded its statutory authority under section 10505(a).

Because we find for the petitioners' on the statutory authority argument, and reverse on those grounds, it is unnecessary for us to address any other car hire argument that the petitioners posit.

To foreclose any confusion about our holding today, we emphasize that we do *not* hold that the Commission can never exempt compliance with section 11122, *see supra*. Indeed, once the predicate findings under 10505 (a) have been made, the Commission can exempt compliance with section 11122. Thus, contrary to the petitioners' contention, the Commission could deregulate compliance from its car hire rules and could permit carriers to enter bilateral agreements free from regulations. What it cannot do is end run rule-making procedures by labeling a new regulatory structure as an exemption.

For the reasons set forth above, we vacate the car hire component of the Commission's *Boxcars* decisions.

V. The Alaska Railroad

Sea-Land Service, Inc., and two other carriers (Sea-Land)[3] protest the Commission's decision to exempt boxcar freight rates from regulation[4] insofar as it applies to the Alaska Railroad. Sea-Land contends that the Commission lacks authority to deregulate the railroad's rates, and that even if it has such power, its ruling does not comport with the exemption section of the Staggers Rail

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[3] Sea-Land Service, Inc., is an ocean carrier and Sea-Land Freight Services, Inc., is its motor-carrier subsidiary. Totem Ocean Trailer Express, Inc. (Totem), another ocean common carrier, does business in Alaska under joint-rate arrangements with motor carriers. These three carriers oppose the exemption of the Alaska Railroad from boxcar freight-rate regulation. These parties are hereinafter referred to collectively as Sea-Land.

[4] *Exemption From Regulation—Boxcar Traffic* (*Boxcars I*), 367 I.C.C. 424, 441 & n.35 (1983), *on reconsideration, Exemption from Regulation—Boxcar Traffic* (*Boxcars II*), 367 I.C.C. 745, 748-752 (1983).

Act.[5] That section, as we have said, permits Commission action thereunder only when application of a regulatory provision of the Act is unnecessary to effectuate the national rail transportation policy,[6] which includes prohibitions on predatory pricing, predatory practices and unlawful discrimination.[7] We find that the Commission erred in embracing the Alaska Railroad within its directive to deregulate boxcar freight rates.

The Alaska Railroad is a federally-owned and -operated carrier created by the Alaska Railroad Act of 1914.[8] The statute delegated administration of the railroad to the President,[9] who subdelegated that function initially to the Secretary of the Interior and later to the Secretary of Transportation.[10] The latter's management role, however, is restricted in a very important respect. By virtue of Executive Order 12,434,[11] rates promulgated by

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[5] 49 U.S.C. § 10505(a) (Supp. V 1981), specifying that the Commission "shall" exempt a transportation service when it finds that application of a provision of the Act

(1) is not necessary to carry out the transportation policy of section 10101a of [the Act]; and

(2) either (A) the . . . service is of limited scope, or (B) the application of the provision . . . is not needed to protect shippers from the abuse of market power.

[6] 49 U.S.C. § 10101a(1)-(15) (Supp. V 1981).

[7] See *id.* § 10101a(13).

[8] Act of Mar. 12, 1914, ch. 37, 38 Stat. 305, codified as amended at 43 U.S.C. §§ 975-975g (1982) [hereinafter cited as codified].

[9] 43 U.S.C. § 975 (1982).

[10] See Exec. Order No. 3681 (1923), superseded by Exec. Order No. 11,107, 28 Fed. Reg. 4225 (1963), *reprinted in* 43 U.S.C. § 975f note (1982) (Transfer of Functions). These subdelegations were authorized by 43 U.S.C. § 975f (1982).

[11] Exec. Order No. 12,434 § 1, 48 Fed. Reg. 33,229 (1983).

the Secretary of Transportation are subject to final action by the Commission,[12] which is authorized to act with respect to the Alaska Railroad as though it were subject to designated sections of the Staggers Rail Act and other legislation.[13] Included in this enumeration of statutory provisions is the section conferring the exemption power upon the Commission.[14]

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[12] *Id.* § 2(a).

[13] *Id.* § 3. A previous directive, Exec. Order No. 11,107 (1963), *reprinted in* 43 U.S.C. § 975f app. (1982), left unclear whether it was the Commission, or instead the Secretary of Transportation, who possessed this authority. See *Sea-Land Serv., Inc.* v. *ICC* (*Sea-Land I*), 225 U.S.App.D.C. 276, 277-278, 697 F.2d 1166, 1167-1168 (1983). Executive Order 12,434 clarified the meaning of its forerunner in this regard and explicitly affirmed the Commission's power to prescribe rates. See *Sea-Land Serv., Inc.* v. *ICC* (*Sea-Land II*), No. 83-1136, (D.C. Cir. June 27, 1984) at 4. The Secretary of Transportation, however, retains a function; he "is authorized to establish rates and enter into rate arrangements, including contracts, with other parties to the same extent as comparable rail carriers subject to the jurisdiction of the Interstate Commerce Commission. . . ." Exec. Order No. 12,434 § 2(a), 48 Fed. Reg. 33,229 (1983).

Executive Order 11,107 was in effect when the Commission initially exempted boxcar freight rates. Executive Order 12,434 came into being during the course of the Commission proceedings and from then on was applied by the Commission. See, *e.g., Boxcars II, supra* note 2, 367 I.C.C. at 749 n.12. Executive Order 12,434 governs here. *Bradley* v. *School Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476, 488 (1974); *Thorpe* v. *Housing Auth.*, 393 U.S. 268, 281-282, 89 S.Ct. 518, 526, 21 L.Ed.2d 474, 484 (1969); *United States* v. *Alabama*, 362 U.S. 602, 604, 80 S.Ct. 924, 926, 4 L.Ed.2d 982, 983-984 (1960) (per curiam); Sea-Land II, *supra*, at 6-9.

[14] See Exec. Order No. 12,434 § 3, 48 Fed. Reg. 33,229 (1983) (referencing subchapter I of chapter 105 of the Staggers Rail Act of 1980, which includes 49 U.S.C. § 10505, the exemption section, as a provision with respect to which the Commission may act analogously in dealing with the Alaska Railroad's rates).

A. *Predatory Pricing and Practices*

We first address Sea-Land's claim that the Commission's inclusion of the Alaska Railroad within its rate-deregulation order clashes with the Staggers Rail Act's interdiction—as part of the national rail transportation policy—on predatory pricing and practices.[15] On this ground, Sea-Land insists that deregulation of the Alaska Railroad's boxcar freight rates exceeds the Commission's exemption authority.

As we assess this argument, we bear several considerations firmly in mind. Our responsibility as a court reviewing informal agency action is to determine whether is it "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." [16] The essence of this task is to ascertain whether the agency engaged in reasoned decisionmaking,[17] an inquiry which neither allows us to substitute our own judgment nor to second-guess conclusions that are rationally supported.[18] Beyond that,

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[15] See Joint Brief for Petitioners Sea-Land Service, Inc., and Sea-Land Freight Service, Inc., and for Intervenor Totem Ocean Trailer Express, Inc., at 13-42 [hereinafter cited as Brief for Sea-Land].

[16] 5 U.S.C. § 706(2) (A) (1982).

[17] *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 290, 95 S.Ct. 438, 444, 42 L.Ed.2d 447, 458 (1974); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167, 83 S.Ct. 239, 245, 9 L.Ed.2d 207, 215 (1962); *Office of Communication of United Church of Christ* v. *FCC*, 228 U.S.App.D.C. 8, 20-21, 707 F.2d 1413, 1425-1426 (1983); *National Small Shipments Traffic Conference* v. *CAB*, 199 U.S.App.D.C. 335, 342-343, 618 F.2d 819, 826-827 (1980).

[18] *Motor Vehicle Mfg. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, —— U.S. ——, ——, 103 S.Ct. 2856, 2866-2867, 77 L.Ed. 2d 443, 457-458 (1983); *International Ladies' Garment Workers' Union* v. *Donovan*, —— U.S.App.D.C. ——, ——, 722 F.2d 795, 814 (1983); *National Small Shipments Traffic Conference* v. *CAB*, *supra* note 17, 199 U.S.App.D.C. at 342, 618 F.2d at 826.

several features of this case militate in favor of considerable deference to the Commission's expertise in rail transportation matters. Although the Commission abandoned preexisting regulatory rules and policies, it did so under an explicit and forceful mandate from Congress.[19] Then, too, the Supreme Court has recognized that while an agency's predictive decisions must remain rational,[20] "complete factual support" is not necessary for agency conclusions resting upon "judgment and prediction rather than pure factual determination."[21] Moreover, Congress itself saw the need to depend upon the Commission's ex-

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[19] See note 5 *supra*; note 22 *infra*.

[20] See *Motor Vehicle Mfg. Ass'n* v. *State Farm Mut. Auto. Ins. Co., supra* note 18, —— U.S. at ——, 103 S.Ct. at 2871, 77 L.Ed.2d at 463. The court must review the record to determine whether the agency " 'identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation.' " *International Ladies' Garment Workers' Union* v. *Donovan, supra* note 18, —— U.S.App.D.C. at ——, 722 F.2d at 822, quoting *Telecator Network* v. *FCC*, 223 U.S.App.D.C. 336, 355, 691 F.2d 525, 545 (1982). Accord *National Small Shipments Traffic Conference* v. *CAB, supra* note 17, 199 U.S.App.D.C. at 345-346, 618 F.2d at 829-830 (although complete support is not required, the decision must be rational, based on consideration of all relevant factors, and adequately explained).

[21] *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594, 101 S.Ct. 1266, 1274, 67 L.Ed.2d 521, 534 (1981). Accord *FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-814, 98 S.Ct. 2096, 2121, 56 L.Ed.2d 697, 726 (1978); *FTC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1, 29, 81 S.Ct. 435, 450, 5 L.Ed.2d 377, 395 (1961); *Telecator Network* v. *FCC, supra* note 20, 223 U.S.App.D.C. at 349, 691 F.2d at 538; *NAACP* v. *FCC*, 221 U.S. App.D.C. 44, 52, 682 F.2d 993, 1001 (1982); *Stereo Broadcasters, Inc.* v. *FCC*, 209 U.S.App. D.C. 229, 234, 652 F.2d 1026, 1031 (1981); *United States* v. *FCC*, 209 U.S.App.D.C. 79, 100, 652 F.2d 72, 93 (*en banc* 1980); *National Small Shipments Traffic Conference* v. *CAB, supra* note 17, 199 U.S.App.D.C. at 345-346, 618 F.2d at 829-

pertise to effectuate a revitalization of our national rail transportation system.[22]

To gauge the likelihood of predation by the Alaska Railroad and the corresponding need for continued rate regulation, the Commission had to engage in an in-depth inquiry into the railroad's unique status as a federal facility. The Commission considered the implications of governmental ownership and subsidies, and the railroad's immunity from the antitrust laws, and concluded that predatory conduct by the railroad in the wake of boxcar freight-rate deregulation was highly unlikely.[23] The Commission discounted the ability of rate regulation to curb below-cost pricing aimed at elimination of competitors, which the subsidies the Alaska Railroad actually

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830; *Missouri-Kansas-Texas R.R. Co.* v. *United States,* 632 F.2d 392, 406 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017, 101 S.Ct. 3004, 69 L.Ed.2d 388 (1981).

[22] Congress found that "modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads to save energy and combat inflation." Staggers Rail Act of 1980, Pub. L. No. 96-448, § 2(9), 94 Stat. 1895. The Commission's exemption authority was made the "important cornerstone" of the modernization envisioned by Congress, and was to be used "to actively pursu[e] exemptions for transportation and service that comply with the section's standards." H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60 (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News 3978, 4005. Additionally, the Conference Report made clear that Congress expected the Commission to remove "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News 4110, 4137. See also note 30 *infra* and accompanying text, discussing the scope of the exemption power.

[23] *Boxcars II, supra* note 4, 367 I.C.C. at 748-750. See also *Boxcars I, supra* note 4, 367 I.C.C. at 441 n.35; *Exemption from Regulation-Boxcar Traffic, Ex Parte No. 346* (*Sub. No. 8*) (*Boxcars III*), at 8, Joint Appendix (J. App.) 146 (Nov. 30, 1983).

received made possible. The Commission noted that rate reduction is limited by carrier costs, but acknowledged that subsidies could enable pricing below costs.[24] The Commission did not believe, however, that the Alaska Railroad's subsidies, which assist capital expenditures and passenger service rather than freight operations, would lead to freight rates that, if reviewed, would be found by the Commission to be unreasonably low.[25]

In predicting that the Alaska Railroad will not engage in predation, the Commission also took into account factors in addition to subsidy, ownership and immunity. It looked at market share, noting that approximately 75 percent of the freight transported between the continental United States and Alaska is handled by the railroad's competitors, Sea-Land and Totem.[26] Because the competitors' market share is so significant, the Commission felt that the Alaska Railroad would not adopt a predatory pricing policy as a means of destroying its competitors, and that if it did "it would be a matter of high visibility, and [the Commission] could immediately revoke the exemption." [27] Two other factors considered by the Commission in evaluating the likelihood of predatory pricing were the capacity of the railroad's competitors to withstand vigorous rate competition,[28] and the probability that

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[24] *Boxcars II, supra* note 4, 367 I.C.C. at 749-750. The Commission noted that rate-reduction is limited by carrier costs, but acknowledged that subsidies could enable pricing below costs. *Id.* at 749. The Commission did not believe, however, that it could rationally assume that the Alaska Railroad's subsidies, which assist capital expenditures and passenger service rather than freight operations, would lead to rate-cutting. *Id.*

[25] *Id.*

[26] *Boxcars I, supra* note 4, 367 I.C.C. at 441 n.35; see *Boxcars III, supra* note 23, at 8, J. App. 146.

[27] *Boxcars III, supra* note 23, at 8, J. App. 146.

[28] *Id.*

new competition would emerge if the railroad succeeded in driving its present rivals out of the market and establishing a monopoly.[29]

Despite the Commission's careful analysis and amply-supported conclusions, Sea-Land adamantly disputes the Commission's prognostication on predation.[30] Since, however, Sea-Land's challenge rests on its disagreement with forecasts on the railroad's behavior should rate regulation cease, which the Commission reasonably derived from the record evidence, we cannot upset the Commission's ruling, but must defer to its rational consideration and evaluation of the relevant factors.[31]

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[29] See *Boxcars I, supra* note 4, 367 I.C.C. at 441 n.35; *Boxcars II, supra* note 4, 367 I.C.C. at 750.

[30] Brief for Sea-Land at 15-18. Sea-Land adheres to the belief that traditional economic models of predation cannot safely be applied to a subsidized industry because subsidized businesses are more likely to engage in below-cost pricing than non-subsidized businesses. Sea-Land suggests that, in addition to such economic aims as market-share expansion, even non-economic factors, such as managers' desire for prestige, may lead even subsidized businesses to resort to predatory pricing. *Id.* at 23.

[31] See text *supra* at notes 16-21.

Sea-Land argues that the Commission was bound by *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981), in which it was held that the Commission acted arbitrarily when it included the Alaska Railroad in an exemption of rail transportation of containerized cargo. *Id.* at 1128. The court's justifications for its decision were the Alaska Railroad's immunity from the antitrust laws, its governmental ownership and subsidization, and its potential for predatory pricing as indicated by the fact that Congress had mandated studies on the subject. *Id.* at 1127-1128.

We agree with the Commission that it was not controlled by *American Trucking Ass'ns*, despite the similarity of the issues there and here. After "closely examin[ing] the factors that were cited by the court in light of additional facts and changed laws available on the present record," *Boxcars II, supra* note 4, 367 I.C.C. at 749, the Commission analyzed the

The Commission recognized that if it has miscalculated the Alaska Railroad's propensity for predation, the Department of Transportation and Congress can, and expectably will, step in to check any abuse of the railroad's pricing freedom.[32] Moreover, the Commission is empowered to revoke the railroad's exemption.[33] Sea-Land contends that administrative and legislative oversight will not provide adequate protection, and points out that the railroad's immunity from suit under the antitrust laws precludes an effective judicial remedy,[34] but recent congressional response to concern over the possibility of predatory pricing indicates that Sea-Land's fears may well be unfounded. When Congress passed the Staggers Act, it ordered a Commission study of the Alaska Railroad's freight charges after "[a]llegations [had] been made that the [railroad had] been engaged in predatory pricing to the injury of its privately-owned competi-

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strength and position of the Alaska Railroad's competitors, Sea-Land and Totem; the railroad's subsidy and its immunity from the antitrust laws; and the length of time that had passed without legislative action after Congress had received the studies. *Id.* at 748-751. On this foundation, the Commission predicted competition without predation, even in the absence of continued regulation. *Id.* at 752. Our function is to determine whether the Commission engaged in reasoned decision-making on the basis of the relevant factors, not to second-guess the agency on matters of judgment. See *United States* v. *Alleghany-Ludlum Steel Corp.*, 406 U.S. 742, 755-756, 92 S.Ct. 1941, 1950, 32 L.Ed.2d 453, 464 (1972). See also notes 17-21 *supra* and accompanying text. We think it permissible for the Commission to reevaluate the Alaskan situation on a new record instead of clinging exclusively to *American Trucking Ass'ns.*

[32] *Boxcars II, supra* note 4, 367 I.C.C. at 750.

[33] *Id.* "The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision . . . is necessary to carry out the transportation policy . . . ." 49 U.S.C. § 10505(d) (Supp. V 1981).

[34] Brief for Sea-Land at 40-41.

tors." [35] The study uncovered no evidence to support the claim that the railroad had resorted to predatory pricing.[36] Given that, we deem the Commission's limited reliance on legislative oversight quite reasonable.[37]

After careful scrutiny, then, we perceive no legal infirmity in the Commission's decision to encompass the Alaska Railroad in its ruling exempting boxcar freight rates from regulation. The Commission amply considered the relevant factors, reached rational conclusions and gave plausible explanations for its action. Accordingly, we affirm the Commission's ruling as consistent with the rail transportation policy prohibiting predatory pricing and practices.

B. *Discriminatory Ratemaking*

As we previously observed, Executive Order 12,434 undertakes to empower the Commission to exempt the

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[35] H.R. Rep. No. 1430, 96th Cong., 2d Sess. 143 (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News 4110, 4175; see also Staggers Rail Act of 1980, Pub.L. No. 96-448, § 709, 94 Stat. 1895, 1996.

[36] Section of Cost Development, ICC Bureau of Accounts, Study of Alaska Railroad Rates Pursuant to Section 709 of the Staggers Rail Act of 1980 (1981). See also S. Rep. No. 479, 97th Cong., 2d Sess. 10 (1982) (committee acceptance of findings of study); *Sea-Land II, supra* note 13, at 22 n.17.

[37] The Conference of the House and Senate Appropriations Committees ordered a second Commission study in 1981 to determine whether the Alaska Railroad's rates covered both its costs and its subsidy. H.R. Rep. No. 1400, 96th Cong., 2d Sess. 14 (1980). See Section of Cost Development, ICC Bureau of Accounts, Study of Alaska Railroad Water/Rail Contract Rates and Water/Rail Tariff Rates (1981). Both studies furnish information on the Alaskan economics, and serve to further weaken Sea-Land's contention that the market model upon which the Commission formulated its predictions was representative only of the lower 48 states.

Alaska Railroad from rate regulation.[38] Sea-Land claims that this delegation of purported authority contravenes the Alaska Railroad Act and is therefore invalid.[39] Sea-Land's thesis is that the Alaska Railroad Act, which limits the President's power "to fix . . . rates for the transportation of . . . property" to rates that are "equal and uniform,"[40] forbids the President, and in turn the Commission as his delegate, to deregulate such rates.[41] In Sea-Land's view, a completely unregulated rate, as a product of negotiation, may well be unique to the negotiating parties, and very different from a common-carriage rate, which offers services to an unlimited number of unspecified potential customers at a specified price and under designated conditions.

The congressional decision to entrust the Alaska Railroad to federal authority seemingly was motivated, at least in part, by a desire to foreclose inequitable treatment of its patrons.[42] Considered in conjunction with the legislative effort to mitigate "prohibitive" rates,[43] the primary impetus behind the "equal and uniform" provision seemingly was fairness to those to whom the railroads' rates are offered. Thus, the "equal and uniform" edict most reasonably is construed as a ban on unlawful dis-

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[38] See note 14 *supra*.

[39] Brief for Sea-Land at 45-46.

[40] 43 U.S.C. § 975 (1982).

[41] Brief for Sea-Land at 43-44. Sea-Land further argues that rate regulation is necessitated by the Alaska Railroad Act's requireemnt that the Alaska Railroad "perform generally all the usual duties of a common carrier by railroad." 43 U.S.C. § 975 (1982); Brief for Sea-Land at 52-54. In view of the disposition we make on Sea-Land's "equal and uniform" point, we do not reach the latter question.

[42] See 51 Cong. Rec. 1907 (1914) (remarks of Senator Jones); *id.* at 2101 (remarks of Senator Thomas).

[43] *Id.* at 1576 (remarks of Senator Chamberlain).

crimination, an interpretation in which, in another case, we today concur.[44]

The Commission rejected Sea-Land's analysis of the reach of the "equal and uniform" provision for two stated reasons. One was that the Commission felt that its actions are not subject to that provision:

> The requirement that [the Department of Transportation], through authority delegated by the President, establish "equal and uniform rates" for the [Alaska Railroad], does not create a standard to be enforced by the Commission. We regulate [the Alaska Railroad's] rates under portions of the [Staggers Rail Act] that are specified by Executive Order. [The Staggers Rail Act] contains no requirement that rail rates be "equal and uniform." [45]

The other reason given by the Commission was that the "equal and uniform" requirement could no more invalidate a deregulated rate than a contract rate:

> As [the Department of Transportation] correctly observes, if the "equal and uniform" language prohibited the Commission from exempting a service of the [Alaska Railroad], it would also prevent us from approving the use of contract rates by the [Alaska Railroad], since contract rates can be unequal and nonuniform. Yet Congress itself has acknowledged the existence of [Alaska Railroad] contract rates and has not condemned them as inconsistent with the [Alaska Railroad Act].[46]

We part company with the Commission on both counts.

We think it clear that the Commission must obey the "equal and uniform" mandate in the exercise of its functions pursuant to Executive Order 12,434. The "equal

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[44] *Sea-Land II, supra* note 13, at 10.

[45] *Boxcars II, supra* note 4, 367 I.C.C. at 751 (footnotes omitted).

[46] *Id.*

and uniform" requirement was a limit imposed by Congress when it delegated to the President authority over rates of the Alaska Railroad. The subdelegations by the President necessarily, then, were encumbered by that requirement. To be sure, Executive Order 12,434 confines the Commission to action conformable to specific provisions of the Staggers Rail Act and other legislation.[47] But the Alaska Railroad Act, too, imposes on the Commission, no less than on the Secretary of Transportation, the obligation to respect the "equal and uniform" provision to the same extent that the President would have that duty absent subdelegation.[48]

Nor do we agree with the Commission that deregulation of the Alaska Railroad's rates is validated merely by the fact that it can enter into rate contracts with shippers. While Executive Order 12,434 sanctions such arrangements, it incorporates a mechanism safeguarding against the sort of discrimination that would transgress the "equal and uniform" provision:

> Any contract filed with the Commission shall be available to any other shipper for rates and services for transportation of the same type of commodity under similar conditions to the contract on file, if the other shipper is able to enter into such con-

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[47] See note 13 *supra* and accompanying text.

[48] The Commission's view that the "equal and uniform" provision restricts the Secretary's power to initiate rates, but not the Commission's exercises of authority over them, is difficult to understand. The Commission as well as the Secretary exercises powers that the Alaska Railroad Act confers upon the President. The Commission's authority respecting the Alaska Railroad's rates, though analogous to that over private carriers' rates, nonetheless is derived wholly by delegation from the President. See *Sea-Land II*, *supra* note 13, at 10 & n.8. Since the President himself is encumbered by the "equal and uniform" requirement, so also the Commission must be, for *Sea-Land* II has determined that final ratemaking power resides in the Commission. See *id.* at 4.

> tract at a time essentially contemporaneous with the period during which the contract on file is offered.[49]

Indeed, in our decision issued today in *Sea-Land* II, we rely on the oversight authority conferred on the Commission by this provision to ensure that similarly-situated shippers will be treated identically, thereby guaranteeing nondiscrimination.[50] We thus are not prepared to join the Commission in the view that Alaska Railroad's "contract rates can be unequal and nonuniform" in a manner inconsistent with the "equal and uniform" requirement.

Prohibition of unlawful discrimination, we repeat, is a goal of the national transportation rail policy, which any deregulation of carrier rates must abide.[51] The Commission, in deregulating the freight rates of carriers generally, proceeded on the premise that this action would no more encourage unlawful discrimination than the existing freedom of railroads generally to enter into contract-rate arrangements. It said:

> . . . Congress expressly authorized rail carriers to enter into contracts with individual shippers and almost entirely removed contract service from regulation under the [Staggers Rail Act]. Thus, to the extent that carriers and shippers resort to contracts, carriers may lawfully discriminate with virtually complete freedom.
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> To the minor extent that legal constraints are still applicable to discrimination among shippers of boxcar traffic, it is extremely unlikely that exemption from regulation would give rise to unlawful conduct. Carriers are essentially free to make contracts of this nature in any event, and an exemption from regulation would not seem to provide greater dis-

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[49] Exec. Order No. 12,434 § 2(b), 48 Fed. Reg. 33,229 (1983). See also *id.* § 2(a) (authorizing rate contracts by Alaska Railroad).

[50] See *Sea-Land II, supra* note 13, at 17-21.

[51] See text *supra* at notes 6-7.

> criminatory impetus. We conclude that continued regulation of boxcar traffic is not necessary to carry out the objective of prohibiting unlawful discrimination.[62]

This process of reasoning does not adequately support the Commission's deregulation of the Alaska Railroad's rates in face of the "equal and uniform" provision of the Alaska Railroad Act. Unlike other rail carriers, the Alaska Railroad is not legally at liberty to "lawfully discriminate with virtually complete freedom." On the contrary, whenever the Alaska Railroad contracts with a shipper, it must afford all other similarly-situated shippers the same rates and services for essentially the same term.[53] The Commission's sole justification for its conclusion that deregulation of carrier freight rates generally will not likely incite unlawfully discriminatory rates simply breaks down in the instance of the Alaska Railroad. It follows that we must vacate the Commission's freight-rate exemption order to the extent that it applies to the Alaska Railroad, and remand to the Commission for further consideration of the question whether its freight rates can be deregulated consistently with the "equal and uniform" requirement of the Alaska Railroad Act.

VI. THE CANADIAN RAILROADS

Canadian National Railway Company and Canadian Pacific Limited[54] protest the application of the Commis-

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[62] *Boxcars I*, *supra* note 4, 367 I.C.C. at 443.

[53] See text *supra* at note 49.

[54] Canadian National Railway Company, Canada's largest railroad, operates both in the United States and transcontinentally in Canada. It is owned by the Government of Canada. Supplemental Brief for Petitioners Canadian National Railway Company and Canadian Pacific Limited at 4-5 [hereinafter cited as Supplemental Brief for Canadian Railroads]. Canadian Pacific Limited, a privately-owned Canadian corporation, does business in both the United States and Canada. The cross-border movements of these railroads together total

sion's freight-rate and car-hire exemptions to their international boxcar movements.[55] More specifically, they contend that the Commission acted arbitrarily when it refused to exclude boxcar traffic between points in Canada and the United States from these exemptions. In challenging the freight-rate exemption, the Canadian railroads pose an issue of Canadian law and assert that a Commission finding that regulation impedes boxcar transportation from effectively competing with trucks is invalid with respect to cross-border movements.[56] In their attack upon the car-hire rules, they claim that, because of the peculiar characteristics of rail traffic between the two countries, those rules cannot achieve a reduction in cross-hauling of empty boxcars.[57] We find the Canadian railroad's challenge to the freight-rate exemption unconvincing. And since we have already held the car-hire exemption invalid for other reasons,[58] we address the complaints of the Canadian railroads only for possible guidance in the likely event that the Commission is called upon to consider them again.[59]

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one-third of all their traffic. Supplemental Brief for Canadian Railroads at 5. These two petitioners will hereinafter be referred to collectively as the Canadian railroads.

[55] The car-hire exemption and the new car-hire rules, more fully discussed *supra* Part IV, authorize rail carriers to assess a maximum charge of 35 cents per mile for movements of other carriers' empty boxcars; to negotiate bilateral agreements governing rates for car hire, and for empty-boxcar movements and storage; and to store empty boxcars and reclaim car-hire payments after a 72-hour grace period. *Boxcars I*, *supra* note 4, 367 I.C.C. at 472, Appendix D.

[56] Supplemental Brief for Canadian Railroads at 28-30.

[57] Supplemental Brief for Canadian Railroads at 14-16.

[58] See Part IV *supra*.

[59] Our discussion of the Canadian railroads' claim regarding the car-hire rules concerns only the legal adequacy of their challenges to the Commission's action in this case. We emphasize that this opinion neither forecloses the Canadian rail-

As a threshold matter, the Canadian railroads assert that the Commission failed to consider issues raised in comments on the car-hire rules submitted by them.[60] We cannot agree. In response to the Commission's notice proposing the car-hire exemption, more than 200 parties filed comments.[61] For purposes of discussion, the Commission grouped these responses by issues instead of by participants. Although the Commission has an obligation to identify and ponder all relevant issues,[62] it need not mention by name every commentator whose grievance it examines. We thus reject the argument of the Canadian railroads insofar as it is premised upon the absence of individual references to those submitting comments.

In attacking the freight-rate exemption, the Canadian railroads first assert that the Commission's application of the exemption order to cross-border movements was not justified because problems of boxcar competitiveness and profitability vis-a-vis truck transportation do not exist on rail routes connecting the United States and Canada.[63] This argument, similar to those presented by several other petitioners,[64] strikes both at the Commis-

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roads from voicing the same or similar concerns in the future, nor relieves the Commission of its obligation to duly consider those factors in any subsequent proceeding.

[60] Supplemental Brief for Canadian Railroads at 19-26.

[61] *Id.* at 27.

[62] *See Motor Vehicle Mfg. Ass'n* v. *State Farm Mut. Auto. Ins. Co., supra* note 18, —— U.S. at ——, 103 S.Ct. at 2867, 77 L.Ed.2d at 458; *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc., supra* note 17, 419 U.S. at 285, 95 S.Ct. at 442, 42 L.Ed.2d at 455; *International Ladies' Garment Workers' Union* v. *Donovan, supra* note 18, —— U.S.App.D.C. at ——, 722 F.2d at 814-815; *Telocator Network* v. *FCC, supra* note 20, 223 U.S.App.D.C. at 355-356, 691 F.2d at 544-545.

[63] Supplemental Brief for Canadian Railroads at 28-30.

[64] See Part II, *supra*, at 31-35, 37-38.

sion's reliance on the premise underlying enactment of the exemption provision [65] and the Commission's use of the Conrail study of boxcar movements in the northeastern United States as a basis for exempting from regulation the boxcar traffic of railroads operating in other geographic regions.[66] For the reasons already discussed,[67] we likewise conclude that the Commission's reliance on the Conrail study and other available data to exempt cross-border boxcar traffic was not arbitrary or capricious.

The Canadian railroads also contend that Commission consideration of the interaction between Canadian tariff law and the exemption of cross-border boxcar traffic was inadequate. The Commission found the Canadian tariff-filing requirement [68] "different" but not "incompatible" with the newly-devised system because, it said, carriers could conform to each.[69] The Canadian railroads assert that Canadian law prevents them from reacting to volatile market forces within a reasonable time, thus exposing them to loss of boxcar traffic to other modes of transportation and thereby frustrating the goal of increased competition.[70] The Commission felt that the inflexibility visited upon the Canadian railroads was an insufficient reason to straightjacket American railroads by excluding boxcar movements between Canada and the

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[65] *Boxcars I, supra* note 4, 367 I.C.C. at 427.

[66] *Id.* at 469, Appendix A.

[67] See Part II, *supra*, at 31-35, 37-38.

[68] We are informed that Canada requires parties to international joint-rate agreements to file with the Canadian Transport Commission new tariffs, as well as notices of rate increases, 20 days before they become effective. Supplemental Brief for Canadian Railroads at 24, 25 n.8.

[69] *Boxcars II, supra* note 4, 367 I.C.C. at 752-753.

[70] Supplemental Brief for Canadian Railroads at 25 n.8.

United States from operation of the exemption.[71] The Commission can hardly be deemed to have acted irrationally merely because it chose to make our Nation's regulatory requirements less onerous than those imposed by another country, even if doing so intensifies somewhat the complexities of international freight transportation.

In their challenge to the car-hire rules, the Canadian railroads advance two concerns they believe the Commission did not properly evaluate: an imbalance in traffic flow between Canada and the United States, and the use of specially-equipped cars.[72] The railroads contend that if the Commission had considered these factors, it would have excluded boxcar traffic between Canada and the United States from the car-hire exemption on the ground that the car-hire exemption augurs no beneficial impact on cross-border empty-car movements.[73]

The Commission maintains that it did consider both factors, albeit without specific reference to the Canadian railroads. These factors, the Commission declared, have no special relevance to cross-border boxcar traffic; rather, it said, they are identical to those advanced by many domestic carriers, particularly short-line railroads.[74] We think an agency need not individually address each party's particular situation if it reasonably can evaluate soundly an argument more general in character and deal with it rationally in generic fashion, and we remain mindful that it is not appropriate for a reviewing court to second-guess the agency.[75] We find the action of the

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[71] *Boxcars III, supra* note 23, at 8, J. App. 146.

[72] Supplemental Brief for Canadian Railroads at 6-9, 15.

[73] *Id.* at 14-16, 30-32.

[74] Joint Brief for Respondents at 90-91; *Boxcars II, supra* note 4, 367 I.C.C. at 763.

[75] See notes 17-18 *supra* and accompanying text.

Commission referable specifically to the Canadian railroads free of reversible error.[76]

VII. The Board of Port Commissioners for the City of Oakland

The Board of Port Commissioners for the City of Oakland, California (Port of Oakland), launches an attack upon the Commission's exemption order by contending, very correctly, that our national rail transportation policy prohibits unlawful discrimination, and that the exemption section of the Interstate Commerce Act may be invoked only when continued application of a provision of the Act is not needed to effectuate that policy.[77] The

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[76] The Canadian railroads also contend that the Commission acted irrationally by failing to consider the greater burden placed on them by United States customs laws designed to shield domestically-built cars from competition by Canadian-manufactured equipment. Supplemental Brief for Canadian Railroads at 10. The Canadian railroads assert that, because these laws alter their ability to obtain loaded return movements, they cannot engage in more efficient and competitive boxcar service, and, therefore, they should be excluded from the exemption. *Id.* The force of this argument is greatly reduced, however, when one realizes that the customs laws do not restrict all reloading of Canadian boxcars, for they may be loaded for a through trip to Canada or for local traffic "transported incidentally" during a prompt return to Canada. Joint Brief for Respondents at 91 n.46. The provision in question merely conditions the use of returning boxcars to the extent that such is incidental to their prompt return to Canada. Given this more limited impact of the customs laws on the cross-border rail traffic under the proposed rules, we are unable to say the Commission acted arbitrarily in not addressing customs laws specifically in reaching its decision. See *Motor Vehicle Mfg. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, *supra* note 18, —— U.S. at ——, 103 S.Ct. at 2867, 77 L.Ed.2d at 458 (noting that agency must consider "*important* aspect[s] of the problem" before it) (emphasis supplied).

[77] See 49 U.S.C. §§ 10101a(13), 10505(a)(1) (Supp. V 1981); Supplemental Brief for Port of Oakland at 21-22.

Port of Oakland then asserts that adherence to certain of the Act's port antidiscrimination provisions [78] is essential to that end, and claims that, in issuing the exemption order, the Commission did not adequately take into account the Act's general policy against rate discrimination and its specials focus on ports.[79] We disagree.

The Commission's statutory mandate is to use its exemption authority whenever it "finds that the application of a provision of [the Act] . . . is not necessary to carry out the transportation policy . . . and . . . either . . . the transaction or service is of limited scope, or . . . the application of a provision is not needed to protect shippers from the abuse of market power." [80] The Commis-

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[78] The Port of Oakland directs our attention to two statutory sections. 49 U.S.C. § 10713(a) (Supp. V 1981), allows rail carriers and shippers under certain circumstances to enter into contractual arrangements which will result in disparate rates, but gives ports the right to challenge such contracts if they result in "unreasonable discrimination." *Id.* § 10713(d)(2)(A)(ii). Similarly, 49 U.S.C. §§ 10741(a)-(c) (Supp. V 1981), which prohibits discrimination by common carriers, specifically excludes contract rates approved by § 10713, but then excepts from the exclusion challenges by ports seeking to prevent harm caused by such discrimination. *Id.* § 10741(f)(1). Hence, ports can file discrimination complaints based on contracts negotiated under § 10713.

[79] Supplemental Brief for Port of Oakland at 17-25. The Port of Oakland asserts that deregulated railroads will be at liberty to provide or withhold services, to modify rates at will without prior or subsequent notice to the public, and to charge varying rates for substantially similar service to different ports, places, or types of traffic. *Id.* at 3. The Port alleges that railroads can thus "concentrate the movement of goods in boxcars through favored ports and deprive other ports of opportunities to handle the traffic." *Id.*

[80] 49 U.S.C. §§ 10505(a)(1)-(2) (Supp. V 1981), quoted in pertinent part *supra* note 5. Exercise of this authority is expressly restricted in several situations, see 49 U.S.C. § 10505(g) (Supp. V 1981), but none of them exists here.

sion did not consider the impact of boxcar freight-rate deregulation on railroads' abilities to engage in rate discrimination specifically against ports.[81] The Commission did, however, discuss generally the anticipated effects of deregulation on such rates, and it concluded that continued rate regulation would not be needed to curb unlawful discrimination.[82] Moreover, we are told that no specific discrimination problem faced by ports in general, or by the Port of Oakland in particular, was presented to the Commission either before it made known its resolve to exempt boxcar freight rates or at any time thereafter during the administrative process.[83] In these circumstances, while some discrimination concerns may be peculiar to ports,[84] we do not find the Commission's failure to mention them compelling enough to render its decision arbitrary. Given the Commission's grasp of the broad consequences of deregulating boxcar freight rates, and the generalized nature of its predictions thereon, we cannot say that it was irrational to conclude that the antidiscrimination goals of the Act can be achieved without further governmental regulation of those rates. We caution, however, that the Commission has a continuing duty to periodically reexamine its deregulatory scheme and to make appropriate adjustments as needed;[85] and,

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[81] In addition to alleging that deregulation will allow railroads to discriminate against ports, see note 79 *supra*, the Port of Oakland assumes that, because filing of tariffs will no longer be required, ports will be "powerless" to detect discriminatory pricing and, consequently, to take action against it. Supplemental Brief for Port of Oakland at 25. See note 78 *supra*, discussing the statutory provisions authorizing ports to file complaints of discrimination.

[82] *Boxcars I, supra* note 4, 367 I.C.C. at 442-443.

[83] Joint Supplemental Brief of Respondents at 2 n.1.

[84] See note 79 *supra*.

[85] *Telocator Network* v. *FCC, supra* note 20, 223 U.S. App. D.C. at 361 n.191, 691 F.2d at 550 n.191; *Public Serv. Comm'n*

of course, the courts remain open for future challenges should experience demonstrate serious shortcomings in its policies or achievements.[86]

VIII. Conclusion

Our review of the ICC boxcar exemption decisions has led us to conclude that the Commission's general ex-

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v. *FPC,* 151 U.S.App.D.C. 307, 317, 467 F.2d 361, 371 (1972); *National Ass'n of Theatre Owners* v. *FCC,* 136 U.S.App.D.C. 352, 361, 420 F.2d 194, 203 (1969), *cert. denied,* 397 U.S. 922, 90 S.Ct. 914, 25 L.Ed.2d 102 (1970); *American Airlines, Inc.* v. *CAB,* 123 U.S.App.D.C. 310, 319, 359 F.2d 624, 633 (*en banc*), *cert. denied,* 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966); see *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 225, 63 S.Ct. 997, 1013, 87 L.Ed. 1344, 1367 (1943); *National Ass'n of Regulatory Util. Comm'rs* v. *FCC,* 173 U.S.App.D.C. 413, 421, 525 F.2d 630, 638, *cert. denied sub nom. National Ass'n of Radiotelephone Sys.* v. *FCC,* 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976).

[86] *Atchison, T. & S. F. Ry.* v. *ICC,* 188 U.S.App.D.C. 360, 377, 580 F.2d 623, 640 (1978); *American Airlines, Inc.* v. *CAB, supra* note 85, 123 U.S.App.D.C. at 320, 359 F.2d at 634; *Shell Oil Co.* v. *FPC,* 520 F.2d 1061, 1072 (5th Cir. 1975), *cert. denied sub nom. Chevron Oil Co.* v. *FPC,* 426 U.S. 941, 96 S.Ct. 2660, 49 L.Ed.2d 394 (1978). In *Public Serv. Comm'n* v. *FPC,* 167 U.S.App.D.C. 100, 511 F.2d 338 (1975), we engaged in precisely this type of reevaluation with respect to an agency order deregulating natural gas rates by providing for advance payment to gas producers. Although in 1972 we sustained the agency's effort as a "justifiable experiment in the continuing search for solutions to our nation's critical shortage of natural gas," *Public Serv. Comm'n* v. *FPC, supra* note 85, 151 U.S.App.D.C. at 317, 467 F.2d at 371, we later, in followup litigation again attacking the agency's action, struck it down because the agency had "failed to engage in 'meaningful review, analysis, and evaluation' " of the practical results of its experiment. *Public Serv. Comm'n* v. *FPC, supra,* 167 U.S.App.D.C. at 104, 511 F.2d at 342, quoting *Public Serv. Comm'n* v. *FPC, supra* note 85, 151 U.S.App.D.C. at 317, 467 F.2d at 371. See generally *American Pub. Gas Ass'n* v. *FPC,* 186 U.S.App.D.C. 23, 38-39, 567 F.2d 1016, 1031-1032 (1977).

emption of boxcar freight rates from regulation was amply reasoned and supported by the record. But we conclude, as well, that in exempting joint rates from regulation, the ICC failed to adequately consider the potential for large railroads with "market" power over a through route to appropriate profits which deservedly belong to small railroads that are co-participants with the large carrier in joint rates for that route. It is therefore certainly within our remedial discretion, and we think it appropriate, to vacate the ICC order to exempt boxcar freight rates from regulation only so far as it applies to joint rates. *See, e.g., Action on Smoking and Health* v. *Civil Aeronautics Board*, 699 F.2d 1209, 1212 n.13 (D.C. Cir. 1983) (vacating recission of prior regulation only to the extent the court found such rescission not adequately explained); *Monsanto Co.* v. *Kennedy*, 613 F.2d 947, 956 (D.C. Cir. 1983) (remanding for FDA reconsideration of only that part of its decision that applied to levels of chemical in beverage containers as to which the agency had not generated data at the time of its initial decision). In so doing we are admittedly concerned that the resulting situation—in which joint rates remain regulated but other rates are not regulated—could cause a disequilibrium in the Commission's deregulation policy as well as in the transportation market, *i.e.*, shippers might tend in some cases to move away from using unregulated single carrier routes in favor of through routes, or vice-versa, or other dislocations in the boxcar freight market might ensue. Of course, any such predictable imbalances would presumably justify the ICC in promulgating temporary emergency rules to govern the situation until either the ICC reevaluates its exemption of joint rates in light of our holding today or until it can, under the notice and comment procedure of the Administrative Procedure Act, promulgate new permanent rules which reflect our holding. *See* 5 U.S.C. §§ 553(b)(B), 553(d)(3) (agency may for "good cause" issue rules without notice or public procedure); *Small Refiner Lead Phase-Down Task Force*,

705 F.2d at 554; *American Federation of Government Employees* v. *Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). Such rules of course must avoid the problems we have identified in this opinion of large carriers abusing their power over small carrier co-participants in through routes. *ILGWU* v. *Donovan*, No. 82-2133, slip op. at 5 (D.C. Cir. April 30, 1984) (court's "unambiguous mandate [may not be] blatantly disregarded by [agency issuing interim emergency orders]"). Other than this limitation, it is for the Commission, and not this court, to decide if interim rules are needed and if so what those rules should provide. *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 554; *cf. Action on Smoking and Health* v. *Civil Aeronautics Board*, 713 F.2d 795, 800 (D.C. Cir. 1983) (promulgation of order without notice and comment procedures under 5 U.S.C. § 553(b)(B) is proper only if the agency concludes there is an "emergency situation . . . [where] delay would do real harm").

We have also concluded that the ICC car hire decision was a promulgation of a substantive rule, and not an exemption authorized by 49 U.S.C. § 10505(a) and therefore must be vacated. In addition, we find that the ICC relied on an improper view of its role in assuring that the Alaska Railroad's rates be "equal and uniform" and therefore vacate and remand for further consideration the rate exemption as applied to the Alaska Railroad. We find unpersuasive, however, petitioners' arguments that the general maximum rate exemption must be vacated as applied to Canadian-United States boxcar traffic, or that the valid portions of the order will allow undue discrimination against ports. Finally, we have considered other arguments raised by the parties, not explicitly addressed in this opinion, and find them without merit. For the reasons set forth above, this case is remanded to the Commission for proceedings consistent with this opinion.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 83-1462

AND CONSOLIDATED CASE NOS. 83-1465, 83-1466, 83-1468, 83-1469, 83-1479, 83-1490, 83-1538, 83-1543, 83-1544, 83-1546, 83-1547, 83-1551, 83-1555, 83-1558, 83-1571, 83-1572, 83-1574, 83-1577, 83-1614, 83-1628, 83-1655, 83-1665, 83-1673, 83-1700, 83-1709. 83-1710, 83-1717, 83-1718 and 83-2245

BRAE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS
CONSOLIDATED RAIL CORPORATION,
E.F. HUTTON CREDIT CORPORATION,
SEATTLE & NORTH COAST RAILROAD COMPANY,
INTERVENORS

[Filed Aug. 24, 1984]

ORDER

Before: ROBINSON, *Chief Judge*, and Wald and Mikva, *Circuit Judges*.

It is ORDERED, by the Court, sua sponte, that the Per Curiam Opinion filed on June 27, 1984 be, and hereby is, amended as follows:

> Page 43, line 9, delete the sentence commencing with "The ICC itself," in its entirety and insert in lieu thereof:

"While the ICC itself mentioned antitrust laws as a possible remedy for predatory pricing by large railroads against small railroads generally, *See Boxcar I*, 367 I.C.C. at 442, it never mentioned antitrust remedies either as a deterrent to potential monopolizing stemming from the relationship created by co-participation in joint rates or through routes or as an after-the-fact remedy that would correct such abuses by large carriers, *see Boxcar I*, 367 I.C.C. at 443-44.

Per Curiam For the Court

GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983
No. 83-1462
And Consolidated Cases

BRAE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

CONSOLIDATED RAIL CORPORATION,
E. F. HUTTON CREDIT CORPORATION,
SEATTLE & NORTH COAST RAILROAD COMPANY,
INTERVENORS

[Filed Aug. 27, 1984]

ORDER

Before: ROBINSON, *Chief Judge;* WALD AND MIKVA, *Circuit Judges*

On consideration of the Petitions for Rehearing of Respondent, Interstate Commerce Commission and of Intervenor Consolidated Rail Corporation, it is

ORDERED by the Court that the aforesaid Petitions for Rehearing are denied.

Per Curiam
For the Court:

GEORGE A. FISHER,
Clerk

BY: ROBERT BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 83-1462
And Consolidated Cases

BRAE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

CONSOLIDATED RAIL CORPORATION,
E. F. HUTTON CREDIT CORPORATION,
SEATTLE & NORTH COAST RAILROAD COMPANY,
INTERVENORS

[Filed Aug. 27, 1984]

ORDER

Before: ROBINSON, *Chief Judge;* WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA AND STARR, *Circuit Judges*

The Suggestions for Rehearing *en banc* of Respondent, Interstate Commerce Commission and of Intervenor Consolidated Rail Corporation have been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the Suggestions for Rehearing *en banc* are denied.

Per Curiam
For the Court:

GEORGE A. FISHER,
Clerk

BY: ROBERT BONNER
Chief Deputy Clerk

Circuit Judge Bork did not participate in this order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 83-1462
And Consolidated Cases

BRAE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

CONSOLIDATED RAIL CORPORATION,
E. F. HUTTON CREDIT CORPORATION,
SEATTLE & NORTH COAST RAILROAD COMPANY,
INTERVENORS

Filed Aug. 27, 1984

ORDER

BEFORE: ROBINSON, *Chief Judge;* WALD AND MIKVA, *Circuit Judges*

On consideration of the conditional motion for extension of time to respond to motion for clarification, it is

ORDERED by the Court that the aforesaid motion is dismissed as moot.

Per Curiam
For the Court:

GEORGE A. FISHER,
Clerk

BY: ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983
No. 83-1462
And Consolidated Cases

BRAE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

CONSOLIDATED RAIL CORPORATION,
E. F. HUTTON CREDIT CORPORATION,
SEATTTLE & NORTH COAST RAILROAD COMPANY,
INTERVENORS

Filed Aug. 27, 1984

RESPONSE TO PETITION FOR CLARIFICATION

Before: ROBINSON, *Chief Judge;* WALD AND MIKVA, *Circuit Judges*

Conrail has filed a petition requesting clarification as to wheather our holding vacates the exemption as applied to all joint rates or only to those involving class III railroads.

The basis for our vacation of the ICC order as to joint rate provisions was the failure of the Commission to explain adequately the likely effect of deregulation of joint rates on rate divisions. Given this failure, we are in no position to decide at this time whether any part of the joint rate exemption is justifiable. The initial decision as to the scope of the exemption is for the Commission to make and to explain. In its original decision, the ICC exempted all boxcar traffic from statutory joint rate

provisions without distinguishing class III railroads from larger railroads. We vacated that exemption in total. On remand, the ICC is of course free to revisit its decision. Our task is solely to insure that it provides adequate justification for whatever it does.

Per Curiam
For the Court:

George A. Fisher,
Clerk

By: Robert A. Bonner
Chief Deputy Clerk

APPENDIX D

31447

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 346 (SUB-NO. 8)

EXEMPTION FROM REGULATION—BOXCAR TRAFFIC

TABLE OF CONTENTS

EX PARTE NO. 346 (SUB-NO. 8)

EXEMPTION FROM REGULATION—BOXCAR TRAFFIC

Decided April 29, 1983

Transportation by boxcar of all commodities except nonferrous recyclable materials is exempted from regulation under authority of 49 U.S.C. 10505(a). Railroads are authorized to impose charges for storage or return of empty boxcars and at their option to negotiate bilateral car hire agreements to apply in lieu of car hire rates prescribed by the Commission.

DECISION

BY THE COMMISSION:

I. INTRODUCTION

By petition filed May 22, 1981, the Consolidated Rail Corporation (Conrail) asked the Commission to grant an exemption from regulation under 49 U.S.C. 10505(a)[1] for all transportation it provides in boxcars. The exemption would apply to movements in all boxcar types—equipped, unequipped, refrigerated, and livestock[2]—and would embrace all regulated aspects of a movement, including rates, divisions, car hire, car service, and common carrier duties. In response to Conrail's petition, the Commission instituted this rulemaking proceeding inviting public comment not only on the proposed exemption as applicable to Conrail, but also on a partial or complete exemption of boxcar transportation by all railroads nationwide.[3]

More than 200 comments were filed by Federal and State agencies, railroads, boxcar lessors, shippers, motor and water carriers, and others.

[1] Section 10505(a) provides as follows:

> In a matter related to a rail carrier providing transportation subject to the jurisdiction of Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—
>
> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

[2] Types A, B, R, and S.

[3] Notice published January 28, 1982 (47 F.R. 4100).

Replying to the comments, Conrail offered a somewhat less expansive proposal: to end boxcar rate regulation for all commodities except non-ferrous recyclable materials, allow railroads to impose storage and return movement charges on empty boxcars, and permit carowners and users to negotiate car hire charges in lieu of Commission-prescribed charges; but to retain Commission jurisdiction over car hire and car service, mandatory interchange of equipment, reciprocal switching, car supply, and freight car pooling agreements. We received supplemental comments on Conrail's modified proposal.[4] On November 23, 1982, we heard oral argument.

After carefully considering the comments and arguments, we are exempting boxcar service from regulation to the extent described in Conrail's modified proposal. The exemption applies to all railroads subject to our jurisdiction. It affects the pricing of boxcar transportation and the charges that apply to boxcar equipment. We shall discuss each of these separately.

II. Exemption of Boxcar Traffic from Rate Regulation

A. *Background.*—Until the midseventies, 1970s, the Commission administered a pervasive scheme of railroad rate regulation to preserve rather complex, rigid relationships among the freight rates charged to competing shippers located throughout the country. Challenged rates were often judged unreasonably high if they exceeded rates on "comparable" movements and were held to be discriminatory if their disparity with other rates was not justified in accepted, and highly limited, ways. Among the key features of this regulatory scheme were the required publication and filing of tariffs by railroads specifying all their freight rates; the opportunity for shippers and other railroads to challenge filed rates before the Commission's Suspension Board at the time of filing; and the right of any party to challenge the lawfulness of an existing rate at any time by filing a complaint with the Commission. This scheme of regulation minimized upward and downward rail rate flexibility. It often prevented timely rail rate increases to adjust to changing rail costs and rail rate decreases to compete for new traffic or retain existing traffic. The rigidity of railroad rate structures was reinforced by rules governing shipments transported jointly by two or more connecting carriers under a single rate. Any party to such a joint rate that sought to change or cancel the rate without the concurrence of the other participants was required to justify its action to the Commission in an adversary proceeding that was generally strongly contested by the other participants and extraordinarily expensive and time consuming.

[4] Notice published June 25, 1982 (47 F.R. 27573).

The rise of a vigorous trucking industry in the United States, and the inability of the regulated rail industry to compete effectively in its pricing and routing decisions were among the reasons for the steady financial deterioration of the industry and a number of bankruptcies, including that of the giant Penn-Central Transportation Company, the main predecessor to Conrail. In the 1970's, in recognition of these problems, public policy toward the railroads took a new turn. Public and congressional sentiment were principally embodied in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act)[5] and the Staggers Rail Act of 1980 (SRA).[6] The premise of both bills was that trucking competition had rendered continued railroad regulation, to a large degree, both undesirable and unnecessary. It was undesirable because it deprived the railroads of the marketing and pricing flexibility needed to compete effectively both inter- and intramodally. It was largely unnecessary to protect users of the rail system, because the option of truck transportation gave most shippers all the protection they needed against unfair or unreasonable railroad practices.

To provide rail carriers with greater flexibility in marketing their services more competitively, the SRA significantly limited the Commission's regulatory powers. It withdrew Commission jurisdiction to find rates unreasonably high when they do not exceed specified ratios of revenue to variable cost,[7] precluded the Commission from finding rates unreasonably low when they cover a narrow category of railroad expenses,[8] eliminated the unlawfulness of discrimination where the compared rates apply over different routes,[9] permitted cancellation by a carrier of marginally profitable or unprofitable joint rates without the concurrence of connecting carriers,[10] and allowed carriers and shippers to negotiate contracts in lieu of relying solely on published tariffs.[11]

While these deregulatory steps freed the railroads of major restrictions on a large share of their activities, Congress left in place much of the regulatory mechanism. In particular, carriers must still file and conform to public tariffs specifying the prices charged for all noncontract services performed between all points and areas served. Price changes must be delayed to observe tariff notice requirements. Moreover, tariffs are still subject to expensive and time-consuming Commission proceedings and litigation.

[5] Public Law 94-210, 90 Stat. 31 (1976).
[6] Public Law 96-448, 94 Stat. 1895 (1980).
[7] 49 U.S.C. 10709.
[8] 49 U.S.C. 10701a(c)(4)(B).
[9] 49 U.S.C. 10741(f)(3) and (4).
[10] 49 U.S.C. 10705a(c).
[11] 49 U.S.C. 10713.

Congress addressed the problem of these and other remaining regulatory encumbrances by instructing the Commission to exempt railroad services from regulation under specified circumstances. Exemptions under the 4-R Act required findings that regulation was unduly burdensome and served no useful purpose. The SRA exemption provision, now codified at 49 U.S.C. 10505(a), (see footnote 1), eliminates the test of burdensomeness, and instead requires that exemptions be granted wherever continued regulation is unnecessary. The Conference Committee's report on the SRA places an affirmative duty on the Commission to "pursue partial and complete exemptions from remaining regulation" so as to "eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power * * * reviewing carrier actions after the fact to correct abuses * * *."[12]

The Commission has granted general exemptions from regulation for rail transportation of fresh fruits and vegetables (1979), certain other food items (1980), vegetable seeds (1981), citrus pomace (1981), hops (1982), liquid iron chloride (1983), and other agricultural commodities except grain and sunflower seeds (1983). Now pending is a proposed exemption for frozen foods. In addition, the Commission has exempted *all* transportation provided in rail "piggyback" equipment (trailers and containers on flatcars, or TOFC/COFC) (1981). We are also considering an exemption for export coal.[13]

B. *Overview of public comments.*—Conrail asserts that a boxcar exemption would further the goals of the SRA and of the national rail transportation policy embodied therein. Specifically, Conrail envisions that, by eliminating tariff filing requirements, an exemption would obviate much paperwork[14] and end the delay in rate adjustments caused by notice

[12]The Conference Committee report states that:

> The bill permits exemptions whenever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition. The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commision will pursue partial and complete exemptions from remaining regulation. The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose. Particularly, the conferees expect that as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.

H.R. Rept. 96th Cong., 2d sess. 83, 105 (1980).

[13]Ex Parte No. 346 (Sub-No. 7), *Railroad Exemption—Export Coal.*

[14]Conrail states that it printed 5 1/2 million pages of tariffs in 1980. With deregulation, it would maintain its boxcar rate information on computers.

requirements and administrative proceedings. It would also lead to simpler and more responsive rate quotations tailored to the circumstances of particular movements, and would facilitate the adjustments needed to keep each rate both competitive and compensatory.

An exemption would also give Conrail more freedom to negotiate satisfactory divisions of revenue from joint rates or to establish proportional rates to assure the profitability of interline traffic.[15] Although 49 U.S.C. 10705a enables a carrier to cancel or apply surcharges to joint rates, Conrail views this remedy as less than satisfactory since it applies only to traffic making little or no contribution to overhead costs, requires time-consuming preparation for administrative proceedings and possible litigation, and leads to a proliferation of surcharges, making tariffs more complex.

Conrail states that the value of pricing flexibility and ratemaking simplicity has already been shown in the context of other exemptions. On fresh fruits and vegetables traffic, for example, carload volume increased by 23 percent the first year after exemption,[16] and by an additional 11 percent the next year.

Conrail predicts that the threat of existing and potential motor carrier competition, as well as competition between railroads and other market forces, such as geographic and product competition would check the railroads' ability to abuse any market power they may possess on boxcar traffic. Further, Conrail submitted data substantiating its claim that it has little or no market power over most boxcar traffic. Although Conrail petitioned for an exemption applicable only to its own traffic, it states that application of the exemption to all railroads would be desirable to facilitate negotiations on jointly provided services.

Among the railroads, the Southern Pacific Transportation Company (SP) and its subsidiary, the St. Louis Southwestern Railway Company, also support a nationwide exemption of boxcar traffic from rate regulation. Their experience under the Commission's exemption of TOFC/COFC traffic is favorable, and they believe that similar results would occur if regulatory ratemaking restraints were removed from boxcar traffic. They state that the railroads reversed a trend of decline in TOFC/COFC shipments in 1981 after the traffic was exempted from regulation in March of that year, while boxcar loadings continued to decline. SP credits the TOFC/COFC success to the carriers' greater willingness to commit capital, time, manpower, research and service to TOFC/COFC operations given the assurance that prospective regulatory action would not negate the benefits of the commitments.

[15] Eighty percent of Conrail's boxcar traffic is interlined. Conrail states that revenue division arrangements have forced it to handle most of this traffic at a loss.

[16] *Rail General Exemption Authority*, 361 I.C.C. 211 (1979).

The Federal Trade Commission (FTC), the Department of Transportation (DOT), and the Department of Justice (DOJ) strongly support an exemption of boxcar traffic applicable to all railroads. They argue that maximum reliance on freely competitive ratemaking is the most cost-effective approach to meeting shipper needs and protecting them from abuse of market power. They also contend that railroad pricing freedom is constrained not only by truck competition but also by intramodal competition and by the ability of users of a given commodity to draw from more than one source of supply or use substitute products. DOJ suggests that the Commission exclude from the exemption any individual commodities found subject to abuse of railroad market power.

Shippers supporting the exemption state that their traffic in many cases has already shifted substantially from boxcars to trucks or TOFC/COFC service. They expect a boxcar exemption to enable the railroads to offer more flexible and responsive service. Some of the supporting shippers deal in commodities such as coal that do not move in boxcars. They contend that they are paying unnecessarily high rates to subsidize unprofitable rail operations such as boxcar service, and they support an exemption to allow the railroads to rationalize their boxcar rate levels.

A user of refrigerated boxcars, Iowa Beef Processors, Inc., states that the refrigerated car supply has gravitated toward traffic now exempt from regulation, to the detriment of shippers of regulated commodities, such as meat. It seeks an exemption for all commodities transported in refrigerated boxcars.

Many railroads, on the other hand, oppose the exemption, believing that rate exemption of all traffic transported in boxcars is too large a step to take at one time. They urge the Commission to pursue exemptions on a commodity-by-commodity basis. Carriers connecting with Conrail fear that the latter's free use of proportional rates will cause overall rate levels on through shipments to rise to noncompetitive levels and cause diversion to trucks. Short-line railroads fear that selective joint rate cancellations by Conrail will leave them without connections and leave their shippers without service.

The Departments of Defense (DOD) and Agriculture (USDA) also oppose a boxcar exemption. DOD regards regulation as necessary to assure that boxcar service will continue to be provided. USDA fears increased food transportation costs and loss of service to certain destinations. The Commission's Office of Special Counsel, although not opposed to an exemption for refrigerated and livestock boxcars, would limit any further exemption to individual commodities identified as not being subject to abuse of market power.

A number of shippers, along with several State and local agencies, also oppose a boxcar exemption. Some assert that the absence of tariffs would mean a loss of stability in transportation rate levels and would deprive shippers of knowledge of the rates paid by their business competitors. Small shippers say that they lack leverage to negotiate favorable rate levels and fear that an exemption would encourage rate discrimination. There is also a fear that car supply would become unreliable if carriers are exempted from the common carrier obligation to provide equipment for loading upon request. Many shippers regard themselves as captive to railroads and believe that an exemption would expose them to excessive rates.

Finally, certain motor carriers and a water carrier seek continued boxcar regulation to protect them from predatory pricing. Several State regulatory commissions ask that the boxcar exemption be applied to intrastate traffic only at their discretion. Other groups seek assurance that uniform packaging requirements and loss and damage liability would continue.

C. *Threshold issues.*—Some participants argue that an exemption from rate regulation for all boxcar traffic is beyond our authority. They contend that Congress intended our exemption authority to extend only to single commodities or minor segments of railroad service. We reject this view. Our mandate is framed in very broad terms and extends to exemptions for "a person, class of persons, or a transaction or service"[17] whenever we make the findings required. Our action here is applicable to a class of persons (railroads subject to our jurisdiction) and to a service (transportation provided in boxcars). Congress specifically sanctioned a comparably broad interpretation of these terms in stating that it would permit an exemption of TOFC/COFC service.[18] Moreover, Congress must have foreseen that for the Commission to "eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power,"[19] it must apply the exemption authority to broad categories of service where circumstances permit. Futhermore, our prior equipment exemptions have been sustained by the courts and by all reports are working quite well, see *e.g.,* Ex Parte 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation* (not printed), served February 19, 1981, affirmed *sub. nom. American Trucking Associations* v. *I.C.C.*, 656 F. 2d 115 (5th Cir. 1981). In any event, we have given considerable attention here to the commodities normally transported in boxcar.

[17] See note 1, *supra.*
[18] Section 10505(f).
[19] See note 12, *supra.*

Another general argument made by opponents is that the railroads do not need an exemption of boxcar traffic because of the other freedoms they have been granted under the Staggers Act. In effect, they argue that regulation should be retained, because it is not unduly burdensome. This argument fundamentally misconceives the mandate of section 10505(a). Congress has directed that the Commission *shall* grant exemptions wherever it finds that continued regulation is *not necessary.* The ultimate issue is not whether regulation is harmless, but only whether it *must* be retained to carry out the rail transportation policy and protect shippers from market power abuse. If regulation is not necessary under these criteria, our instructions are to grant the exemption.

The great depth of the congressional commitment to use of the exemption power is further revealed by the SRA's modification of the earlier version of section 10505 so as to eliminate a requirement that the Commission act "only after an opportunity for a proceeding." In other words, the statute no longer even requires us to develop a public evidentiary record before we utilize our exemption power. (Nevertheless, out of a desire to act with the best possible record before us, we solicited and received substantial public commentary.)

Although one of the options before us is to grant an exemption for Conrail alone, this approach has virtually no support in the record and requires little discussion. Conrail and virtually every other party recognize the desirability of applying any exemption to all railroads. To exempt the boxcar traffic of Conrail while subjecting the traffic of other carriers to continued regulation would give Conrail a competitive advantage not warranted by economic considerations. In addition, it would introduce greater complexity into the provision of boxcar service by railroads and its use by shippers. For these reasons and in light of our action on the broader exemption, we will reject the Conrail-only option without further discussion and focus our attention on the question of exempting the boxcar traffic of all railroads.

To grant an exemption, we must find *both* (1) that continued regulation is not necessary to carry out the policy of section 10101a, *and* (2) that either the transaction is of limited scope *or* that regulation is not needed to protect shippers from the abuse of market power. We grant the exemption on the basis that continued regulation is not necessary either to carry out the rail transportation policy of section 10101a or to protect shippers from the abuse of market power. Therefore, there is no need to determine whether a boxcar exemption is a matter of limited scope.

We next discuss whether continued regulation of boxcar traffic is necessary with regard to each of the major aspects of rate regulation addressed by the participants in this proceeding.

D. *Maximum reasonableness.*—Whether continued regulation of boxcar traffic is necessary to prevent unreasonably high rates is an important

question under the exemption criteria of section 10505(a). One aspect of the rail transportation policy is to maintain reasonable rates in the absence of effective competition (section 10101a(6)). Controlling unreasonable rates is also an essential component of protecting shippers from the abuse of market power.

1. *General constraints on boxcar rates.*—The fundamental premise underlying the proposal for a boxcar exemption is that truck competition for the transportation of boxcar commodities is pervasive and limits the railroads' pricing freedom. The typical boxcar commodity is a packaged or palletized commodity loaded by a forklift truck—the same type of commodity that is typically transported in motor carrier van trailers. Virtually anything that can be transported in a boxcar can be transported in a truck. Motor carriage tends to be faster, more accessible, more convenient, and sometimes less damaging to freight than rail service, meaning that boxcar transportation generally must be priced to reflect these service differences to compete successfully. Thus, the market itself places an effective ceiling on rail rates for boxcar transportation, and regulation is unnecessary to assure that boxcar rates do not rise to unreasonably high levels.

A number of parties contend, nonetheless, that maximum rate regulation of boxcar traffic is necessary. They argue that, where the cost of truck service is much higher than the cost of reasonably priced rail service, truck competition does not prevent boxcar rates from rising to exorbitant levels. They cite long distance, large volume, and special loading characteristics as factors that can make truck transportation more costly and, in effect, of negligible competitive importance.

Shippers will not have to rely on truck competition alone to control boxcar rates. Alternate routes over different railroads are often available, especially over longer routes, giving shippers the benefit of intramodal price competition.[20] Moreover, most boxcar commodities can also be transported in other types of rail equipment. Since shippers control the type of car ordered, they can turn to nonboxcar equipment if threatened with unreasonable boxcar rates. On TOFC/COFC equipment, rates are strictly controlled by truck competition, while on other types of equipment, market dominant rates remain regulated.

A shipper's transportation options are not the only market constraint on boxcar rates. Carriers are aware that there is a certain rate level above which a shipment simply will not move. The shipper must set a market price for his product at a level that covers, among other things, the cost

[20]Even though a shipper's plant may be served directly by only a single railroad, we can require that railroad to provide switching services for other railroads serving the same vicinity. We are retaining jurisdiction to require reciprocal switching of or joint use of terminal facilities for boxcar traffic. Shippers themselves may dictate routing of any shipment.

of transportation. At a given market location, if the delivered price of the product exceeds the cost to a buyer of purchasing from another source or purchasing a substitute product, the shipper cannot compete in that market and will cease shipping to it. Carriers have no incentive to price their shippers out of their markets and thereby lose their own profitable business. Geographic and product competition, then, often set effective limits on the carrier's pricing freedom.

It should also be recognized that powerful shippers can exert leverage to control transportation rates in markets where competition may be weak. Many rail shippers are large companies shipping or receiving a variety of commodities regularly at a number of points. The railroads serving them simply cannot afford to lose their patronage. Thus, even if a carrier should find itself in a position to charge an unreasonably high rate to the company at one location, it normally would refrain from doing so to avoid a retaliatory loss of the shipper's business at that or at other locations where competition exists.

2. *Measures of ability to abuse market power.*—The record contains two types of general quantitative data on the railroads' ability to abuse market power in pricing boxcar commodities. Modal share figures show the percentage of total traffic of particular commodities that have been handled by boxcars and by trucks. Revenue to variable cost ratios provide a basis for judging rate levels on particular commodities.[21]

Conrail adduced 1980 modal share figures for 18 groups of commodities moving to, from, or within the Northeast.[22] These 18 groups account for over 70 percent of total boxcar tonnage in 1980. For the majority of the groups, trucks transported well over 50 percent of the traffic. In all but two groups, the boxcar share is below 40 percent. Boxcar shares increase substantially for shipments moving farther than 1,000 miles, but exceed 90 percent for only 3 of the 18 commodity groups even at that distance. Boxcar shares also increase for shipments over 60,000 pounds, again exceeding 90 percent for 3 of the 18 groups. Commodities moving by design or choice in larger shipments will tend to move more in boxcars than in trucks as compared to smaller shipments. However, as noted by Conrail, shipment size "* * * reflects the actual loaded weight of boxcars and trucks, not the inherent commodity characteristics or order quantities which might limit a product to a single mode." In addition, DOT presented 1977 nationwide figures for 25 groups of commodities which show that none had a truck market share lower than 20

[21] The statistics cited in the parties' comments, referring to 1980 or earlier, do not fully reflect the present stength of truck competition. The Motor Carrier Act of 1980 resulted in significant new entry into the business of common carrier trucking, while contract and private motor carriage have benefited from the removal of operating and equipment leasing limitations, and recent legislation has relaxed truck size and weight limits.

[22] See appendix A.

percent and most were well above 50 percent.[23] These data show that trucks have already captured the lion's share of the market. Further, these statistics on market share percentages are more indicative of what transportation alternatives have been selected in the past as opposed to what alternatives are currently available, especially as a result of the more recent regulatory reform legislation.

Exemption opponents raise two major questions about the market share data. First, they contend that the commodity groups analyzed by Conrail and DOT are aggregations of many individual commodities. Thus, the market share figures are averages that may mask high boxcar market shares for certain commodities within the groups. Second, they argue that even though trucks may transport a high share of a particular commodity, the traffic in that commodity which continues to move by boxcar may have different characteristics making it captive to railroads.

Conrail also provided revenue to variable cost ratios for the 18 commodity groups in its study.[24] The ratio for the highest group is only 154 percent; all but four groups have ratios below 120 percent. The Commission has no jurisdiction even to examine the reasonableness of any rate producing a ratio below 170 percent.[25] Thus, it is clear that rates on all these commodity groups are severely constrained by market forces.

Exemption opponents challenge Conrail's reliance on average ratios for aggregations of commodities. A witness for Itel Corporation, Robert L. Banks, used data from a 1977 report by A. T. Kearney to show that some of the commodities included in Conrail's study have ratios above 180 percent for some of their movements on a nationwide basis.[26] Rates by themselves do not indicate the degree of market power possessed by the railroad, since they do not tell us whether a proposed rate will actually move traffic over an extended period of time. If the rate is high, shippers may find alternatives more attractive, forcing the rate back down again. Some may accept the high rate because of a preference for the carrier or because of a premium service associated with it. The market share data and revenue/cost ratios clearly show, however, that on the vast majority of boxcar traffic railroads are experiencing severe competition from motor carriers and are under stringent market constraints in setting boxcar rates. Moreover, we have criticized on a number of occasions the validity of the Kearney report data. Exemption opponents, at best, have raised the possibility that there may be occasional exceptions to this general conclusion among the particular commodities transported by boxcar.

[23] See appendix B.
[24] See appendix A.
[25] 49 U.S.C. 10709(d)(2)(C).
[26] See appendix C.

Moreover, we would be totally unable to exercise our powers to exempt a "class of persons" or a "service" under section 10505 if we were required to find that every person in the class (rather than the class as a whole) or every recipient of the service (rather than the recipients as a group) satisfied the requirements for an exemption. Of course, in an investigation under section 10505, reasonable classes of persons and categories of service should be defined to guide the investigation. Here, the evidence of record divided boxcar commodities into reasonably related groups under a standard classification system. We do not believe that, once reasonable classes and categories have been defined, as they have been here, the statutory criteria could feasibly be applied to individual shippers and movements within each class.

3. *Commodities.*—While we see no need to examine every possible boxcar commodity individually, we shall review specifically those few commodities about which the greatest cause for concern has been presented. These are: auto parts, paper and forest products, grain, and metals.

a. *Auto parts.*—The major American automobile manufacturers oppose a boxcar exemption, arguing that transportation of motor vehicle components by truck is not an economical alternative because the traffic is geared to boxcar transportation. Auto parts are transported in high volume on specially designed reusable racks in extra-large (86 foot) boxcars. Shippers assert that the same volume could not be handled efficiently in truck-sized shipments.

The market share and revenue/cost data submitted by Conrail and DOT on automotive equipment unfortunately lump together auto parts transported in boxcars and finished vehicles transported in a different type of freight car.[27] An attachment to the statement of Ford Motor Company shows that about half of the 1977 shipments of automobile parts within the Eastern United States were transported by truck.

Conrail indicates that automobile manufacturers are now shifting more of their parts traffic to trucks as they attempt to minimize in-process inventory. Conrail also states that there is strong competition between railroads to transport automobile parts. Of the 38 automotive assembly plants in the eastern ratemaking territory, 28 have direct access to more than one railroad. Even plants served by a single carrier receive traffic for which many routings are possible.

Although boxcars may be the lowest cost mode of transportation for many shipments of automobile parts, it does not necessarily follow that boxcar rates on this traffic would rise to unreasonable levels in the

[27] The overall boxcar share for parts and vehicles considered together is only 26.6 percent. See appendix A.

absence of regulation. With trucks already heavily involved in this market, any increase in boxcar rates can be expected to cause some diversion of traffic. Intramodal competition also exists to prevent any individual carrier from pricing at unreasonable levels. Finally, automobile manufacturers are a classic example of large shippers that can exercise economic leverage to deter unreasonable pricing by the carriers serving them. We have little doubt that this combination of factors would suffice to preclude any significant abuse of market power on auto parts traffic in the absence of regulation. Indeed, rail carriers have entered into a number of contracts with auto parts shippers. This reflects the relatively equal bargaining power of the two groups and the carriers' desire to retain this traffic. Furthermore, high revenue/cost ratios do not necessarily mean that market power is or can be abused. It may, instead, reflect a shipper's willingness to pay more for a premium service, see also 49 U.S.C. 10709(d)(4).

b. *Paper and forest products.*—The category of paper and forest products embraces a large array of commodities, only a few of which present any serious question concerning market power. Conrail's market share data[28] show an overall boxcar share of 85 percent for pulp.[29] The boxcar share rises to 96 percent for shipments over 1,000 miles. Paperboard has an overall boxcar share of 75 percent, rising to 96 percent for shipments over 60,000 pounds. Comparable figures for paper are 40 percent and 94 percent. The boxcar share of millwork is only 37 percent overall, rising to 90 percent for movements over 1,000 miles. On the other hand, according to Conrail data, none of these commodity groups has an average revenue to variable cost ratio above 122 percent. Itel's evidence shows that about 15 to 25 percent of the shipments of these commodities moved at revenue to variable cost ratios above 180 percent; newsprint stands out with 64 percent of shipments above that level.

Even though boxcars transport relatively high percentages of the shipments of these commodities, it is nonetheless apparent that railroads are generally subject to severe market constraints in pricing that transportation. Trucks already participate substantially in the shorter movements and smaller shipments. Even in the case of newsprint, Conrail states that it has received requests from shippers for competitive rate reductions, showing that trucks are increasingly viable competitors even at fairly remote origins in Eastern Canada.

Intramodal competition also exists for the transportation of paper and forest products, even where only one rail carrier directly serves a

[28] See appendix A.

[29] DOT's nationwide data show a rail share of only 58 percent for pulp (appendix B).

receiver. Reciprocal switching is available at many points. At others, rail competitors interline with trucks to effect delivery—as CSX is doing on pulpboard shipments to points in Conrail's territory. Conrail states that it experienced a precipitous falloff in weekly carloadings of SP when it put a surcharge into effect, showing heavy diversion to rail and truck competitors. Finally, these commodities are available from a number of producers, so that no carrier can price a movement excessively without making its shipper's product uncompetitive and thereby drying up the flow of traffic. We conclude that continued regulation of boxcar transportation of paper and forest products is not necessary to protect shippers from unreasonably high rates.

c. *Grain.*—Several grain shippers oppose a boxcar exemption, although others support it. Conrail's study shows only 23 percent of grain mill products moving by boxcar, with an average ratio of revenue to variable cost of only 107 percent, and 41 percent of the traffic moving by truck. DOT's nationwide figures show the truck share to be even greater. Much of the truck and boxcar traffic appears to be grain in packages or bags.

The only serious question of market power in grain transportation concerns bulk shipments. The Miller's National Federation alleges that revenue to variable cost ratios on grain are frequently in excess of 200 percent and would rise to 300 or 400 percent in the absence of regulation. It cites the recent decision of an Administrative Law Judge which determined that a railroad's rates on wheat and barley transported from Montana to the Pacific coast produced ratios of nearly 300 percent, a level which the Administrative Law Judge found to be unreasonably high.[30]

Other evidence in the record substantially mitigates these concerns in our view. Boxcars transport only a minor and rapidly decreasing share of bulk grain traffic, with most rail transportation provided in covered hopper cars. For example, in North Dakota, boxcars transported 31 percent of the interstate tonnage in 1979, but only 2 percent in 1981.[31] This record, and our knowledge of transportation issues generally, convince us that the 40-foot boxcars used to transport bulk grain are obsolete and eventually will all be retired from service and branch lines may be upgraded to accommodate larger covered hoppers. As long as shippers have the option of shipping in regulated covered hopper cars and in trucks, exemption of boxcar rates will not expose them to abuse of market power by railroads. We note that the Commission will retain, as

[30]No. 37809, *McCarthy Farms, Inc.* v. *Burlington Northern, Inc.*, (not printed), served December 14, 1981. The Commission has reopened this proceeding for further consideration.

[31]Source: ALK Associates, 1979-1981 ICC 1-percent waybill sample. Transmitted to Chairman Taylor by letter of November 30, 1982, from Charles N. Marshall of Conrail, in response to a question asked at oral argument.

part of its jurisdiction over car supply obligations, its ability to ensure that railroads provide shippers with an appropriate supply of available regulated equipment.

d. *Metals.*—Comments submitted by shippers of metals are evenly divided between supporters and opponents of a boxcar exemption. Conrail's evidence shows high truck shares and low revenue to variable cost ratios for steel mill products, nonferrous metal products, and nonferrous metal shapes.

Although shippers of aluminum and aluminum products claim to be defenseless against boxcar rate increases, large amounts of their traffic move by truck or by other types of rail equipment. The average revenue to variable cost ratio that they claim for their boxcar movements, "well over 160 percent," is below our jurisdictional threshold.

Aluminum shippers argue that railroads have a substantial cost advantage over trucks in carrying large items such as aluminum ingots over long distances. They have cited a pending Commission proceeding in which rates on aluminum ingots from the Northwest to the East, Midwest, and South were shown to produce revenue to variable cost ratios averaging 227 percent, which an Administrative Law Judge deemed to be unreasonably high.[32]

Even if, as these shippers contend, some aluminum shipments are tied to railroads, they are not tied to boxcars. The traffic at issue in the cited *Aluminum Association* case moved in bulkheaded flatcars, gondola cars, and boxcars. Some of it, indeed, moved by truck, on flat-bed trailers. As long as shippers have the option of using regulated service, their boxcar rates can be expected to remain competitive with the regulated service rates. Again, we note that the Commission will retain its ability to ensure that railroads provide shippers with an appropriate supply of available regulated equipment. In the case of those aluminum products that do move chiefly by boxcar, other market forces exist to control rail rate levels. An Administrative Law Judge recently found that shipments of "aluminum can sheet" face both geographic and product competition.[33] We conclude that continued regulation of boxcar rates is not necessary to protect aluminum shippers from the abuse of market power.

e. *Other commodities.*—We have specifically discussed those commodities about which the most plausible concerns have been expressed. Some shippers of a number of other commodities have claimed to be "captive" to railroad boxcar transportation and unable to resist the

[32]No. 37466, *Aluminum Association, Inc., v. Akron, Canton & Youngstown Railroad Co.* (not printed) served August 5, 1981. We have reopened this proceeding for further consideration.

[33]No. 37715S, *Aluminum Company of America v. Burlington Northern, Inc.* (not printed), served April 11, 1983.

imposition of unreasonably high freight rates. In no case, however, have we found reason to believe that the boxcar rates on these commodities are unconstrained by the market forces we have discussed.

However, we will not exempt nonferrous recyclables from regulation in boxcar service, only because Congress itself has singled them out for the application of special standards. In section 10731(e), Congress directs that rates on these commodities may not produce a revenue/cost ratio higher than necessary to cover a pro rata share of the railroads' fixed costs, a ratio that currently stands at 146 percent.[34] In view of this specific provision, Congress apparently did not intend our exemption authority under section 10505(a) to apply to nonferrous recyclable commodities.

4. *Conclusion: maximum reasonableness.*—Rate regulation is arguably necessary to prevent abuse of market power only if market forces would permit railroads to increase rates on the service to unreasonably high levels without experiencing a severe loss of traffic. After careful consideration of the present record, we conclude that railroads could not successfully maintain unreasonably high rates on any commodity transported by boxcar.

On most boxcar commodity groups, trucks already are the dominant transportation mode. Even in cases where they are not, boxcar rate levels are generally well below our jurisdictional threshold. We have separately considered the few commodity groups of most apparent concern and found the existence of ample market forces to control boxcar rate levels.

Although it may be that occasional boxcar shipments move at rates above a 180-percent revenue to variable cost ratio, that ratio is only a jurisdiction test, not a reasonableness one. In fact Congress explicitly stated that no presumption of unreasonableness or market dominance attaches to a rate above the threshold level. 49 U.S.C. 10709(d)(4). We have often held rates at higher levels to be reasonable. The present record identifies no commodity moving chiefly by boxcar on which the rate levels are now being controlled by Commission maximum rate prescriptions rather than by market forces.

Conceivably, there exists a specific commodity that for some reason can be transported only by boxcar and on which the rate levels, being uncontrolled by intramodal competition or other market forces, would rise to very high levels in the absence of regulation. We do not totally rule out the possible existence of such a situation. Nonetheless, the Commission must not succumb to "paralysis by analysis." Congress desires that we move aggressively forward in extending the exempt sector of rail transportation, without laboriously erasing every shadow of a

[34] Ex Parte No. 394, *Cost Ratio for Recyclables— 1980 Determination* (not printed), decided November 30, 1982.

doubt before we act. Indeed, it is not possible to erase all doubts about the consequences of an exemption before the fact. Thus, Congress declared that we should instead make exemptions effective and then deal with any special problems "after the fact," not on *a priori* possibilities. (As noted *supra*, we are no longer even required to provide an "opportunity for a proceeding" before we create an exemption under section 10505.) In this spirit, we find no reason to delay further in exempting boxcar traffic from maximum rate regulation.

E. *Predatory pricing.*—A few participants contend that continued regulation is necessary to prevent boxcar rates from being set at levels so low as to be predatory. One goal of the rail transportation policy is to encourage the elimination of noncompensatory rates (section 10101a(10)). Another is to prohibit predatory pricing and practices (section 10101a(13)). Nonetheless, we conclude that there are probably no instances where predatory pricing by railroads on boxcar traffic is a realistic possibility.

Rate decreases are a desired outcome in a competitive environment and ordinarily are not to be discouraged. They become predatory only under a special set of circumstances. These are that the carrier cuts its rates to a level below its marginal costs for the purpose of driving a competitor out of business, so that the carrier can then raise its rates to monopolistically high levels and recoup the losses incurred with the rate cuts. Predatory pricing cannot succeed where the competitor is strong enough to withstand a rate war or where new competitors can quickly enter the market when the carrier attempts to raise its rates to monopolistic levels.

We do not regard railroad predatory pricing on boxcar traffic as a realistic concern for water carriers, motor carriers, and other large railroads. Water carriers operating within the United States mainly transport large volume bulk shipments and depend little, if at all, on the types of commodities transported in boxcars.[35] Motor carriers have the ability to enter any transportation market quickly, so that a railroad could not drive them out of a market long enough to enjoy a sustained period of monopoly pricing. Large railroads have the resources and diversity of

[35] An exception is the Alaska trade, where boxcars moving in water-rail service between the West coast and Alaska compete with trailers and containers moving in water-truck service. Sea-Land Service, Inc. contends that regulation of the Alaska Railroad (ARR) is necessary to prevent predatory pricing since ARR is publicly owned and could rely on subsidies to price below cost.

We regard true predatory pricing on the part of ARR as highly unlikely. In 1981, we determined that the rates of ARR cover the cost of service. *Study of Alaska Railroad Water/Rail Contract Rates and Water/Rail Tariff Charge Rates* (served June 15, 1981). As DOT notes, competitors of ARR transport 75 percent of the freight moving between the continental United States and the area served by ARR. Finally, since there would be no barrier to rapid reentry of competing water-motor service, ARR could not enjoy a sustained period of post-predation monopoly pricing.

other business to withstand any rate war that could be waged on boxcar traffic, making it extremely unlikely that predation against them would ever be attempted.

Predatory pricing on boxcar traffic might be of theoretical concern in a situation where a large railroad's only competition for the transportation of boxcar commodities is a short-line rail carrier with limited resources. However, given the normally intense intermodal competition for boxcar traffic, these situtions must be extremely rare. Furthermore, it is important to emphasize that the mere cutting of rates in a competitive situation is not predatory where the rates cover the carrier's marginal costs, and these costs are difficult to measure precisely. For this reason, the Commission, at the direction of Congress, refuses to interfere in rate decreases except in extreme situations. Even on regulated traffic, we do not disapprove rate decreases where the rate covers that small portion of railroad costs we have labeled as "directly variable."[36] It is also important to recognize that the antitrust laws provide a remedy against attempted monopolization by means of predatory pricing.

We conclude that predatory pricing on boxcar traffic is highly unlikely to occur, and even in those few instances where it is a remote possibility, the antitrust laws exist to provide a sufficient deterrent and remedy. Congress' instruction is that we regulate only in those instances where regulation is necessary to protect against market power abuse *and* other Federal remedies are inadequate for the purpose. See footnote 12, *supra.* Continued regulation of boxcar traffic is not necessary to prevent predatory pricing, nor does it meet Congress' tests for a continued Commission role.

F. *Rate discrimination.*—The third reason urged for continued regulation of boxcar traffic is to prevent discrimination among shippers. A goal of the rail transportation policy is to prohibit "unlawful" discrimination (section 10101a(13)). The field of "unlawful" discrimination, however, is a limited one.

Regulation has never sought to eliminate all railroad rate discrimination, but only those variances which caused "unjust" discrimination. Pricing differences have always been permitted, whether known as "value of service ratemaking," "differential ratemaking," or, more recently, "Ramsey pricing." Rates have also commonly been allowed to vary at different locations depending upon competitive circumstances.

To the extent that the Commission formerly attempted to achieve comparability on rates charged for different movements of a commodity over a broad area, a rigid and uneconomic rate structure resulted which

[36] Ex Parte No. 355, *Cost Standards for Railroad Rates,* 364 I.C.C. 898 (1981).

unduly inhibited the carriers' pricing flexibility and handicapped them in adapting to changing competitive environments. The thrust of regulation today has moved away from this focus on rate comparability and toward freedom for individual carrier pricing initiatives to maximize revenues in competitive markets. Of particular significance are two actions taken by Congress in the SRA to minimize regulation of rate discrimination. First, Congress provided that prohibitions against discrimination do not apply to rail rates applicable over different routes (49 U.S.C. 10741(f)(4)). This provision removed from the Commission's jurisdiction many of the situations in which discrimination complaints had previously been filed. Second, Congress expressly authorized rail carriers to enter into contracts with individual shippers and almost entirely removed contract service from regulation under 49 U.S.C. Subtitle IV (49 U.S.C. 10713(a) and (i)). Thus, to the extent that carriers and shippers resort to contracts, carriers may lawfully discriminate with virtually complete freedom.[37]

To the minor extent that legal constraints are still applicable to discrimination among shippers of boxcar traffic, it is extremely unlikely that exemption from regulation would give rise to unlawful conduct. Carriers are essentially free to make contracts of this nature in any event, and an exemption from regulation would not seem to provide greater discriminatory impetus. We conclude that continued regulation of boxcar traffic is not necessary to carry out the objective of prohibiting unlawful discrimination.

G. *Joint rates.*—A number of parties argue that continued regulation of boxcar traffic is necessary to preserve joint rates for transportation of through boxcar traffic. They view joint rates as essential to the development and continuation of a sound rail transportation system (section 10101a(4)) and to effective coordination among railroads (section 10101a(5), and apparently fear that an exemption would end them.

There is no reason to expect that an exemption would lead to cancellation of all joint boxcar rates. In the face of truck competition, carriers have strong incentives to make through rail service as attractive as possible. One way of doing this is to offer joint rates. Where carriers cannot resolve disputes over revenue divisions, they may resort to proportional rates instead, but this action need not disrupt through movements. As

[37]Section 10713(d) allows a brief period after the filing of a contract with the Commission during which a complaint seeking review of the contract may be filed. As pertinent, only the following grounds for complaint are recognized: (1) the contract unduly impairs the ability of the carrier to serve the complainant; (2) the contract will result in unreasonable discrimination against a port; and (3) in the case of agricultural commodities (including forest products and paper), the carrier has discriminated against the complainant by refusing to enter into a contract with it under similar conditions. Discrimination for these purposes has no broader meaning than under section 10741(f)(4), i.e., it does not pertain to rail rates applicable over different routes.

long as the revenue available from a movement is sufficient to afford a revenue contribution above costs to both carriers, they can be relied upon to set their rates, whether joint or proportional, at a level that will keep the traffic moving.[38] In reaching agreement on divisions on joint rates, neither carrier will insist on a division of profits so disproportionate as to force the other to withdraw from the movement to avoid a loss and thus to forfeit the traffic for both carriers. On the other hand, if the revenue available from the traffic is not great enough to allow even a small revenue contribution for both carriers, no shipper could reasonably expect joint rates to be maintained whether or not the traffic is exempt from regulation. This is especially true since the SRA included new provisions facilitating unilateral cancellation of unprofitable joint rates which has been used extensively by carriers.

H. *Through routes.*—Some parties contend that continued regulation is necessary to prevent carriers from closing through routes for boxcar commodities by refusing to maintain any rates, joint or otherwise, under which through shipments could be transported. These parties contend that through route closings could cripple short-line carriers that depend upon interline boxcar traffic and could deprive shippers on their lines of all access to the rail system. In addition, through route closings could assertedly be used to eliminate intramodal competition and leave shippers without routing alternatives. Thus, they argue that in these respects boxcar regulation is needed under the rail transportation policy to allow competition to establish reasonable rail rates (section 10101a(1)) and to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers (section 10101a(4)).

We see no reason to expect large railroads to cancel through routes with originating or terminating short-line railroads. Of course, route closings might occur if a carrier wishes to close routes that involve long hauls over the lines of connecting railroads in order to concentrate the traffic on routes that involve long hauls over its own lines. Nonetheless, it is unlikely that a carrier acting in an economically rational manner would close efficient routings, and the statute (section 10705(e)) specifically recognizes distance and fuel efficiency as factors corroborating the public interest of closing joint routings. Moreover, the Commission will retain jurisdiction[39] over mandatory interchange, reciprocal switching and joint use of terminal facilities which should allow for remedial action should it be necessary.

[38] Indeed, Conrail indicates that the exemption of fresh fruits and vegetables has enabled carriers to make interline arrangements on short notice and to increase the volume of traffic they transport.

[39] Discussed below under the heading "Retention of Jurisdiction."

I. *Tariff publication.*—Some exemption opponents contend that continued publication of tariffs for boxcar service is necessary to maintain rate stability, to prevent unmanageable ratemaking complexity, and to inform shippers of rates paid by their competitors. This is a legitimate concern. Nonetheless, we do not expect either undue instability or unmanageable complexity to result from this exemption.

Flexibility to adjust rates quickly to meet changing market needs does not imply that rates will change with a frequency that would be disruptive to the business of shippers. Often, rate changes serve to allow a shipper quick access to a new marketing opportunity. This has certainly been our experience with requests to make contracts effective on short notice. Where rate stability is important to a shipper's operations, there is every reason to expect that carriers will provide it in order to retain the shipper's patronage. Indeed a shipper can assure itself of rate stability for exempt services by entering into transportation contracts.[40]

It is difficult to imagine how rates quoted directly to a shipper for exempt transportation could be more complex than some tariff rates. In fact, a major benefit anticipated from this exemption is rate simplification. Railroad tariffs are so complex that we have found it necessary in the past to maintain a staff of tariff experts to find and interpret them for our attorneys and accountants. Under other broad exemptions applying to fresh fruits and vegetables and TOFC/COFC service, rail traffic has increased, suggesting that exemptions make rail service easier and more attractive for shippers to use.

Finally, we recognize that published tariffs provide shippers a convenient source of useful information about their own competitive environments, of which transportation is often an important part. Nonetheless, there is nothing in the rail transportation policy that calls for publicizing railroad rates other than as a tool of rate regulation. Shippers function without knowing their competitors' nontransportation costs. We have consistently resisted attempts to retain regulation merely to serve tangential interests outside of the scope of our direct statutory responsibilities. Freedom from tariff filing requirements is an essential part of the ratemaking flexibility being sought in this proceeding.

J. *Benefits of exemption.*—We have focused on claims of negative effects of a boxcar rate exemption, since section 10101a requires us to find continued regulation unnecessary in granting an exemption. It is ap-

[40]Nor do we believe that boxcar tariffs are necessary for the long-term predictability and stability of rates which Lykes Bros. Steamship Company considers to be essential to the flow of import/export traffic. We discounted similar arguments when we granted the TOFC/COFC exemption, and railroads continue to participate in import/export shipments of containerized goods. Water-rail breakbulk traffic, which relies mainly on boxcars for inland movement, should be no less adaptable to exempt rail transportation.

propriate to recognize, however, that the exemption will actively promote the objectives of the rail transportation policy in a number of ways. Clearly, it will: (1) allow competition and the demand for services to establish reasonable rates (section 10101a(1)); (2) minimize the need for Federal regulatory control over a substantial portion of the rail transportation system (section 10101a(2)); (3) promote more efficient pricing and service on boxcar traffic and allow carriers, to the extent possible, to earn adequate revenues on this traffic, by removing procedural regulatory burdens and allowing rail management to respond flexibly to market conditions (section 10101a(3)); (4) promote effective competition with motor carriers (sections 10101a(4) and (5)); (5) encourage efficient railroad management and elimination of noncompensatory rates by allowing full flexibility to manage boxcar service in the most economic manner (section 10101a(10); and finally, (6) to the extent that it enables railroads to retrieve business lost to the motor carrier industry, promote energy conservation (section 10101a(15)).

K. *Conclusion: exemption from rate regulation.*—Taking the transportation of boxcar commodities as a class of service, and excluding only the carriage of nonferrous recyclable commodities, we find that continued rate regulation is not necessary either to carry out the rail transportation policy or to protect shippers from the abuse of market power. Consequently, we shall grant an exemption under section 10505(a).[41] To allow the rail industry and its customers a reasonable period of time to prepare for the implementation of this exemption, we shall delay its effective date for a period of 6 months.

Implicit in the granting of this exemption is the removal of antitrust immunity for collective ratemaking on boxcar traffic. As DOJ observes, removal of antitrust immunity is the *quid pro quo* for the bestowal of freedom from regulation. Meaningful deregulation is more than a selective relaxation of the regulatory constraints most disliked by the industry. It fosters vigorous competition among the railroads themselves as well as between the railroads and their rival modes of transportation. Removing antitrust immunity for collective ratemaking has been our uniform preclude requisite in exempting other commodities and services from rate regulation. There has been no showing that the public interest requires a different approach in this proceeding.

However, our removal of antitrust immunity is not intended to preclude collective agreements relating to per diem, mileage, demurrage,

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[41] This exemption also applies to intrastate regulation of boxcar traffic. Once a particular category of traffic is exempted by the Commission, this becomes a standard from which a State cannot deviate, unless we find that conditions within the State warrant an exception. *State Intrastate Rail Rate Authority—P.L. 96-448*, 367 I.C.C. 149 (1983).

storage agreements. As explained *infra*, we are retaining jurisdiction over car hire and car service, with certain limited exceptions. In this proceeding, there is no evidence of record which would allow us to find that collective arrangements for car hire, demurrage, et cetera, such as the central car hire processing and clearinghouse function performed by the Association of American Railroads, do not meet the criteria of section 10706. Such issues can be considered in our investigation in Section 5b Application No. 7, *Railroads Per Diem, Mileage, Demurrage and Storage Agreement* or possibly another proceeding.

We are convinced that the exemption of boxcar traffic is a major step toward establishing a vigorously competitive climate in American freight transportation. Once the railroads and their customers have learned to provide and purchase boxcar service as they would any other service in the unregulated sector of the economy, we are certain that they will have no desire to return to an artifically constrained market.

III. EXEMPTION OF BOXCAR EQUIPMENT CHARGES

A. *Background.*—Conrail proposed an exemption not only forratemaking on boxcar commodities but also for those facets of Commission regulation that apply directly to the use of boxcar equipment. For example, the Commission may prescribe the rental (car hire) rates that railroads charge one another for the use of freight cars. We also have jurisdiction to promulgate car service rules concerning the use or return of empty cars, although this authority is now largely delegated to the Association of American Railroads. In addition the Commission regulates car use in certain other ways.[42]

The concerns expressed by Conrail in relation to car regulation focus on car hire. The car compensation formula prescribed by the Commission distributes car ownership costs evenly over the days that a car is in use, regardless of whether a car is on the tracks of the railroad that owns it, or on the tracks of another railroad. While this type of regulation seeks to provide carowners with a fair return on their investment, it can have counterproductive effects on car use. Car hire rates remain the same regardless of whether demand for cars is strong or weak. In times of strong demand, severe car shortages often occur, in part because car hire rates do not rise to a level that would match demand to supply. At the same time, an unvarying car hire rate may fail to allocate freight car capacity to the most profitable traffic, impairing the carriers' ability to max-

[42]Mandatory interchange, reciprocal switching and the joint use of terminal facilities, car supply obligations, and carpooling agreements are discussed below under the heading, "Retention of Jurisdiction."

imize revenue. When demand is weak, car hire rates tend not to fall as they should to stimulate the use of idle car capacity. Anomalously, in fact, car hire rates tend to rise somewhat when demand is weak, because a surplus of cars reduces the number of active car days over which the ownership costs are distributed.[43] Moreover, empty car mileage tends to increase as originating railroads send foreign cars home empty and load interline shipments in their own cars to maximize car hire earnings.[44] Thus, the current system of car hire rules can distort both shortrun decisions about the most efficient utilization of cars and longrun decisions about optimal fleet size.

Conrail, supported by DOT, DOJ and FTC, initially sought a complete exemption of boxcars from car regulation, contending that market-determined car hire rates would lead to better car utilization and that regulating other aspects of car use was unnecessary. This proposal met with massive opposition from the railroad industry and others, and Conrail modified its proposal to suggest that the Commission allow carriers to take the following actions with regard to boxcar equipment use:

(1) assess charges for empty movement or return of cars where performed at the direction of the car owner, the Association of American Railroads, or the Commission.

(2) store empty cars and reclaim car hire beginning 3 days after the car is made empty.

(3) negotiate bilateral agreements governing car hire rates, empty movements, and storage.[45]

Conrail states that the maximum empty mileage charge would be 35 cents per mile, that storage reclaim could not begin until the expiration of a 72-hour grace period from the time the car is made empty, and that these conditions could be made part of the exemption order. Conrail proposes that, in all other respects, boxcars remain subject to car regulation, including the prescription of car hire rates by the Commission for use where carowners and users choose not to negotiate car hire rates bilaterally.

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[43] In fact, under the Commission's current car hire compensation formula, car hire rates were scheduled to rise by 25 percent despite a large surplus of cars, and we granted the railroad's petition to suspend this increase. See Ex Parte No. 334, *Car Service Compensation—Basic Per Diem Charges* (not printed), served March 30, 1983.

[44] The history of car hire/car service regulation and the recurring problems in the area are discussed in the Commission's notice of proposed rulemaking in Ex Parte No. 334 (Sub-No. 5), *Zone of Reasonableness for Car Hire Charges*, published November 5, 1980 (45 F.R. 73524). See also Carl D. Martland, *Overcoming Fundamental Problems in the Car Hire/Car Service System*, 23 Transportation Research Forum Proceedings 549.

[45] Carriers can now negotiate bilateral car hire reductions below prescribed rates. Ex Parte No. 334 (Sub-No. 4), *Flexibility in Setting Railroads Per Diem Levels*, 364 I.C.C. 291 (1980). Conrail argues, however, that traffic-originating railroads have little incentive to agree to such reductions under the present scheme.

Flexibility to negotiate car hire increases above prescribed rates is under consideration in Ex Parte No. 334 (Sub-No. 5), *Zone of Reasonableness for Car-hire Charges*, 364 I.C.C. 299 (1980).

Thus, the alternatives presented for our consideration are to continue car regulation for boxcars in its present form, to exempt boxcars from car regulation altogether, or to adopt the modified Conrail proposal. We are not disposed to leave the present system of car regulation unchanged for boxcars if a less restrictive alternative is available. Excessive costs resulting from wasteful empty movements of boxcars are a problem that must be addressed if our action in this proceeding is to restore the competitiveness of boxcar transportation. Nonetheless, a complete exemption of boxcars from car regulation now has little, if any, support. Consequently, we shall reserve consideration of a complete exemption for car hire and car service and focus on the modified Conrail proposal.

B. *Comments of participants.*—Conrail states that the purposes of the storage and empty return charges are to improve car use and to help it and similarly situated carriers control their car-hire costs. Because Conrail serves an area which receives more freight than it originates, Conrail incurs great expense in the payment of car hire charges on empty foreign boxcars. It predicts that originating carriers would be less eager to send their cars onto the lines of other carriers unnecessarily if those cars were subject to the imposition of empty return charges or storage reclaim. In addition, the power to impose these charges would make other carriers more willing to enter into bilateral agreements with it on car compensation, storage, and return. By reducing its equipment-related costs in periods of slack economic activity, Conrail would be able to price its boxcar transportation more competitively and generate additional traffic.

DOT supports the modified proposal as a means of improving car use without resorting to the more sweeping changes in car regulation originally proposed. It notes the railroads have successfully negotiated and implemented car hire reclaim agreements in the past, demonstrating that bilateral agreements are both beneficial and practical.

The modified proposal failed to elicit support from other participants. A group of western carriers questions whether the proposed empty return charges would improve equipment use. Many parties contend that the proposal would result in inadequate compensation to carowners, since the revenue they receive from car hire payments would be offset by charges imposed by receiving carriers. They fear that boxcar ownership would cease to be profitable and new boxcar investments would not be made. These consequences, they assert, would be contrary to requirements in the rail transportation policy to ensure the development and continuation of sound rail transportation (section 10101a(4)) and to foster sound economic conditions in transportation (section 10101a(5)). A related fear is that carowners would lprohibit the loading of their cars

with shipments destined to carriers that impose storage and return charges, thus reducing boxcar availability, delaying the loading of shipments, and defeating the policy of promoting an efficient rail transportation system (section 10101a(3)).

The comments of some also suggest that the proposal should be denied to protect shippers from the abuse of market power. In fact, the proposal does not directly affect shippers, since it relates only to transactions between railroads for the use of cars owned by or leased to railroads. Use of shipper-owned cars is compensated by a system of allowances negotiated between carriers and shippers. Some contend, however, that Conrail's role as a large destination carrier gives it "market power" in negotiating boxcar compensation with other railroads. The exercise of this market power, they believe, would result in service disruptions having adverse effects on shippers.

C. *Evaluation of proposal.*—We will separately discuss the proposal's likely effects on boxcar use, boxcar investment, and service to shippers.

1. *Effect on car use.*—The western carriers question whether empty return charges would improve boxcar use. They argue that a carrier with a shipment to load would not be deterred by the charges from loading its own equipment and returning foreign equipment empty. Although the origin carrier would have to pay charges for the return of its equipment, this would be offset by charges it would collect for returning the foreign equipment empty.

The concern raised by these carriers is a valid one, warranting a closer look at the new incentives that would be created by empty return charges. While carriers will not be directly encouraged by these charges to load empty foreign cars, they can be expected, in light of the mileage-based return charge, to seek to minimize the length of empty return of their own cars. Assuming that a carrier has 10 loads destined to points beyond its territory and five of its own cars available, it will tend to load its cars to the closest destinations and foreign cars to the more distant destinations. Nationwide, a new pattern should emerge in which off-line equipment penetrates less deeply into other territories, resulting in shorter return hauls of empty cars.

In addition, the empty return charges are only one part of a package of reforms that should induce more efficient practices in other ways. The rule allowing reclaim of car hire for cars not loaded within 3 days should be clearly beneficial. It will take much of the profit out of the practice of sending equipment off line to collect car hire in times of slack demand. It should also encourage carriers, when loading their own equipment rather than foreign cars, to select destinations where return loads are normally available.

The storage and empty return features will benefit the rail system as a whole, and ultimately shippers, by reducing the tendency of the current boxcar interchange system to create empty movements. For example, when an origin carrier makes a decision to press the destination carrier to return boxcars empty, the origin carrier should be given an incentive to weigh the benefits to it from the immediate return of the cars against the cost of the empty movement that the decision will impose on the destination carrier. The empty mileage charge will provide such an incentive. Only when this is done will the efficiency of the *rail network as a whole* be maximized, to the advantage of shippers and consumers.

The third element of the package, the freedom to negotiate bilateral agreements on equipment compensation and charges, should be the most beneficial of all. The main inducement to send cars off line unnecessarily will disappear if car hire rates are free to fall when demand is low. Voluntary car hire reductions are permissible now but are rare, because carowners that originate traffic have no reason to accept less than prescribed levels. The new leverage that car users will have with return charges and storage reclaims should lead to meaningful negotiations on reduced car hire levels. Conversely, carowners will benefit from the freedom to negotiate car hire rates above prescribed levels when demand is strong.

2. *Effect on boxcar investment.*—While the adoption of Conrail's proposal will have some effect on the levels of net compensation received by carowners, we are confident that it will not impair any needed boxcar investment. Those who fear that Conrail or any other carrier would abuse the freedom to impose storage and return charges are overlooking the existence of constraints against such abuse. First, as proposed by Conrail, we will condition this freedom on the observance of a limit on the mileage rate that can be charged for empty movements,[46] and will prohibit the application of a storage reclaim during a 3-day grace period after the car is made empty. A carowner that calls for the return of its car during the 3-day grace period will incur no storage reclaims at all and will pay a return charge subject to the 35-cent limit.

[46] Conrail states that the proposed ceiling of 35 cents per mile is currently agreed to by members of the Trailer Train pool for movement of empty Trailer Train cars and is accepted as an approximation of the variable cost of handling an empty car. Since other parties presented no reason to question the appropriateness of the 35-cent rate for boxcars, we shall adopt it subject to any modification shown to be appropriate in the future. An inflation adjustment will be allowed, based on the rail cost adjustment factors published periodically by the Commission in Ex Parte No. 290 (Sub-No. 2). Those factors currently relate to a base level existing on October 1, 1982, a date relatively close to the April 30, 1982 filing date of Conrail's modified proposal. For convenience, we shall provide that the rail cost adjustment factors shall be applied as though the figure of 35 cents per mile were in effect on October 1, 1982. (See appendix D.)

Second, a carowner that desires a different arrangement governing storage and return has the option of entering into bilateral agreements with car users governing all applicable car rates and charges. There is every reason to expect that the receiving carrier will cooerate if boxcars would otherwise become unavailable for shipments to its territory. Legal freedom to impose storage and return charges does not enable the carrier to disregard the requirements of the carowner. Bilateral agreements may be more or less favorable to the carowner depending on the general level of scarcity of boxcar equipment. In any case, we have no doubt that car users will agree to terms sufficiently remunerative to carowners to assure that cars are available for shipments to there territories[47].

The proposed changes, which allow demand to influence car compensation levels, should not forestall any needed new investment. If the size of the boxcar fleet is excessive for the amount of traffic available, as some now believe, new investment would be inappropriate and should not be stimulated.[48] On the other hand, if the fleet size ever threatened to become inadequate, car users would respond to equipment shortages by bidding up car hire levels to a point that would make new investment profitable. Needed stability of return on the investment can be assured through bilateral car compensation agreements. In response to market stimuli, investment in boxcars, as in any other business asset, will be commensurate with anticipated longrun demand.

Short-line railroads, on the other hand, may have good cause to be concerned about the near term effects of the proposal. For them, the impact of empty return charges is not softened by the opportunity to profit by these charges. Returning foreign equipment cannot be transported nearly as far on their lines as their returning equipment can on the lines of others, so they may earn less from empty return charges than they might pay to retrieve their own equipment. They are left with

[47]Since the traffic flow between Conrail's territory and other regions is imbalanced, Conrail tends to have many empty foreign boxcars on its lines and may often be able to strike more favorable bargains on car compensation than other carriers. Some parties decry this possibility as an exercise of market power. We are not convinced that the exercise of market power would be directed against "shippers" as that term is used in the statute. In any event, we view the result forecast as desirable. Boxcar capacity costs are properly recovered mainly on movements in the direction of the peak traffic flow—in this case, toward Conrail—since these movements create most of the boxcar capacity needs. To require equal car compenstaion on movements in the reverse direction, thus burdening the offpeak flow with an equal share of capacity costs, is economically inefficient. See 1 A. Kahn, *The Economics of Regulation*, 101-103 (1970).

[48]We cannot accept the apparent view of some tha. Congress intends the Commission to encourage the acquisition of boxcars at all times without regard to the needs of the Nation's rail system. Under 49 U.S.C. 11122, if we prescribe car hire charges, we may not hold them down to levels that render car ownership unprofitable and discourage new investment. However, that section neither mandates the prescription of car hire charges nor precludes us from relying on market forces to establish appropriate car compensation. Indeed, it requires us to encourage the efficient use of boxcars—an unattainable goal if the fleet size is excessive.

very strong incentives, in times of slack demand, to load foreign equipment and store their own. While this behavior would be good for the national rail system as a whole in minimizing empty car mileage, it may not fit the mode of operations on which some of these railroads rely. A number of very small carriers have very large boxcar fleets (particularly when measured by the size of the railroad), and they have unfortunately come to depend upon car hire as their main source of income.

When demand for boxcars improves, these carriers should benefit from the opportunity to negotiate car hire rates higher than Commission-prescribed levels. This new system should provide adequate returns in the long run to justify investment in an appropriately sized boxcar fleet. On the other hand, it probably will not provide the steady flow of income that may be desired by individuals who invest in boxcars as tax shelters, using short-line railroads as a medium to place their cars on the Nation's rail system. To the extent that the interests of these investors require the preservation of inefficient and costly mechanisms of car compensation, we must subordinate them to the broader interests of the Nation's railroads and their shippers in restoring the competitiveness of rail transportation. The purchases of boxcars by individuals as investments was in part a response to incentive elements added to the car hire charges for plain boxcars, the purpose of which was to stimulate investment in boxcars. While the incentive element may have stimulated purchase of boxcars, it clearly did not solve the underyling rail problems involving freight rates and car utilization. The Commission instituted a rulemaking to consider the issue and after public comment eliminated incentive per diem charges in Ex Parte No. 252 (Sub-No. 5), *Elimination of Incentive Per Diem Charges*, 364 I.C.C. 116 (1980). Congress was aware of the problem of incentive per diem and in section 224(a)(1) of the Staggers Act, formally removed future Commission consideration of an incentive per diem element in setting car hire charges. The Conference report of the Staggers Act is quite clear that Congress believed that a market based system of arriving at car compensation was preferable and that the Commission should examine means of making the system more responsive to market forces.[49]

[49]The Conference Committee report states that:

> The conferees do not believe that the provision of an incentive element on freight equipment is the best means of attracting capital into the industry for the acquisition of rolling stock. Rather, the rental rate for such rolling stock should be sufficient to pay an adequate return on investment. The conferees do anticipate, however, that the Commission shall continue to examine means such as flexible car hire of making basic car hire more responsive to market forces where this is possible without subjecting carriers which are forced to use cars received in interchange to unreasonable rates. H.R. Rept. 96-1430 96th Cong., 2d sess. 83, 117 (1980).

Subsequent to the Staggers Act, the Commission instituted other proceedings to add elements of market response to the existing system. Today's decision represents another step in the direction of substituting market forces for regulation in the setting of car hire charges consistent with congressional directives.

Congress surely understood the problems associated with car hire charges and appreciated that any movement away from the incentive per diem system or the current system could potentially harm existing third party investors.

The Commission has been instructed to find ways to make car compensation more responsive to market forces. This inescapably introduces supply and demand factors into the compensation equation and, in a market where supply greatly exceeds demand, is bound to result in some financial burdens falling on suppliers. This is indeed unfortunate, but we do not see this as contrary to any of the pertinent considerations under section 10505.

3. *Effect on shippers.*—We acknowledge the possibility that instances of delay or disruption of boxcar supply may occur temporarily as a transition is made to a system involving storage reclaim, return charges, and optional bilateral agreements. Such disruption could occur, for example, if carowners begin restricting their cars against loading to destinations on the lines of carriers imposing the charges. In the end, however, neither carowners nor car users will have any choice but to strike reasonable bargains and go on doing business. No car user can afford to forfeit incoming traffic for lack of cars, and no carowner can afford to forfeit all car rental by insisting on unreaslistic terms of net car compensation. Most railroads are both carowners and car users with strong market incentives to avoid traffic disruption.

For shippers, the effect of more market-oriented equipment charges should be beneficial. When demand for cars is low, carriers' equipment-related costs should fall, reflecting lower net compensation to carowners and less handling of empty cars. Carriers will then be able to offer lower freight rates. When demand for equipment is strong, higher car hire will dictate that preference in equipment allocation be given to high-rated traffic. Thus, shippers making the greatest contribution to rail revenues will be best able to obtain the cars they need.

D. *Retention of jurisdiction.*—Many of the fears expressed on the present record concerning exemption of boxcars from car regulation involve areas of our jurisdiction that will not be disturbed by our present action. As proposed by Conrail, we shall retain jurisdiction over car hire and car service, including the prescription of car hire rates, except to the extent

that we permit imposition of storage and return charges and the optional use of bilateral car compensation agreements. We shall not relax the mandatory interchange requirement for boxcars; equipment loaded with an interline shipment must be passed on to, and accepted by, the connecting carrier to whom the shipment is transferred at a gateway. We shall retain our authority to require reciprocal switching of, and the joint use of terminal facilities for, boxcar traffic. We shall also retain jurisdiction to enforce the railroads' obligation as common carriers to supply boxcar equipment to shippers for loading upon reasonable request. Moreover, our decision has no effect on freight car pooling agreements.

In addition, this exemption is limited by the terms of section 10505(e), which provides that we may not relieve any rail carrier from an obligation to provide contractual terms for liability and claims. Nor shall we require any change in the procedures by which freight packaging requirements are established and administered. For clarification, we note that this decision also does not affect the obligations of rail carriers to compute demurrage charges and establish rules related to those charges, as provided in 49 U.S.C. 10750.

E. *Benefits of exemption.*—Any possible adverse effects of our action on a sound and efficient rail transportation system and on sound economic conditions in transportation will be of limited extent and duration. On the other hand, this action overall will positively serve the rail transportation policy by allowing competition and demand to establish car compensation (section 10101a(1)), promoting efficiency in car use (section 10101a(3)), fostering sound economic conditions in transportation by allowing car compensation to fluctuate with market conditions (section 10101a(5)), promoting reasonable rates for boxcar service (section 10101a(6)), promoting individual rail responses to market conditions in place of collective responses (section 10101a(11)), and promoting energy conservation through reductions in empty car-miles (section 10101a(15)).

F. *Conclusions: exemption of equipment charges.*—In approving Conrail's modified proposal on the subject of car compensation, we are confident that the potential benefits of improved boxcar use and reduced costs of providing boxcar service clearly outweigh the shortrun adverse effects that may be experienced during the transition period. Thus, we conclude that retention of the complete present scheme of car regulation for boxcars, to the extent that it would preclude railroad freedom to impose storage and return charges and make bilateral agreements on car compensa-

tion, is necessary neither to carry out the rail transportation policy of section 10101a, nor to protect shippers from abuse of market power.[50]

Our order adopting Conrail's modified proposal is a partial exemption from regulation subject to conditions. We recognize, however, that it could be construed in some respects as being new regulation. To allay any doubt about the sufficiency of section 10505(a) as authority for our approval of Conrail's modified proposal, we shall take this action also under section 11122. Under that section, we are to encourage not only the purchase and acquisition of freight cars, but also their efficient use. In addition to car compensation, our regulations may include the other terms of any arrangement for use of freight cars. Storage reclaim and return charges clearly constitute such "other terms" and will serve to encourage efficient boxcar use. Section 11122 authorizes, but does not require, the Commission to prescribe car hire charges. Consequently, it permits us to make the prescribed car hire optional and allow the substitution of bilateral car hire agreements (as we have already done to some extent in Ex Parte No. 334 (Sub-No. 4)). In our supplemental notice published June 25, 1982 (47 F.R. 27573), we fully informed the public that we were considering a proposal to authorize the imposition of storage reclaim and return charges on boxcars and to allow optional bilateral car hire agreements; we have received ample public comment on the proposal. Consequently, whether Conrail's proposal with respect to boxcar equipment charges is viewed as an exemption or an affirmative regulation, we may properly adopt it in this proceeding.

The effective date of this action will be delayed for 6 months to enable carowners and users to prepare for it. As provided in 49 U.S.C. 10505(d), we retain jurisdiction to reexamine this exemption in the future if necessary to correct unforeseen problems.

IV. OTHER MATTERS

Regulatory flexibility analysis.—The initial Notice of Proposed Exemption in this proceeding invited public comment on the effect on small entities of both a Conrail boxcar exemption and a nationwide boxcar exemption. This issue was addressed by a number of parties, particularly small shippers and short-line railroads.

Of the anticipated adverse effects on small entities, the most frequently cited is loss of traffic or revenue by short-line railroads as a consequence of joint rate cancellations. Small shippers, lacking the bargaining power of large shippers, fear rate increases that would put them at a com-

[50] The bilateral agreements for car compensation that we are now permitting will be exempt from the requirement for Commission approval under 49 U.S.C. 10706(a)(2)(A) and will not be immune from the application of the antitrust laws.

petitive disadvantage. Boxcar-owning small railroads expect a loss of profits if car users are allowed to impose storage and empty return charges. They also assert their inability to manage the complexity of negotiating car hire charges with many railroads.

We agree that small entities could possibly experience adverse effects in these areas, but we believe, as indicated earlier in this decision, that the extent of the adverse effects tends to be overstated by those opposing the exemption. Carriers desiring to cancel joint rates may do so irrespective of whether this exemption is granted. A beneficial effect of an exemption on joint rate cancellations will be to eliminate possible litigation and other expensive procedural obstacles before the Commission.

There will undoubtedly be instances where large shippers obtain more favorable rates than small shippers for transportation of exempt commodities. Given the economies inherent in handling regularly occurring large volume movements, that result is to be expected. Nonetheless, the greater efficiencies and more vigorous competition that carriers should experience in a free market environment can be expected to benefit small shippers as well as large ones.

Boxcar owners, large and small, may experience a decrease in net revenues as a consequence of storage reclaim and empty return charges. This effect, however, is likely to be limited to periods of slack demand for boxcars. When demand is strong, competition for scarce equipment should lead to negotiated car hire rates higher than prescribed levels, thus offsetting to some degree the adverse effects on carowners during slack periods.

Boxcar-owning small railroads that choose to negotiate car hire certainly will not be alone among other entities of their size in negotiating price levels with a large number of trading partners. We have no reason to think that they will be any less successful than others in adapting to the requirements of their commercial environment. Moreover, under the proposal we are adopting, these railroads will have the option of continuing to employ Commission-prescribed car hire rates.

Alternatives that would avoid the potential adverse effects on small entities would substantially nullify the benefits of the exemption. These would include retaining jurisdiction over joint rate cancellations, retaining Commission review of rate changes, and disallowing the imposition of storage reclaim and empty return charges. We conclude that such effects on small entities that may result from the exemption are not of a type, duration, or severity to warrant adoption of alternatives that would fundamentally undermine the exemption.

Moreover, we note that the intent of the Regulatory Flexibility Act is to correct problems created when laws and regulations designed for application to large scale entities are applied uniformly to small businesses without regard for the disproportionate costs that may be imposed on the small businesses.[51] For the most part, rather than imposing new regulatory requirements, we are decreasing regulation. The resulting adverse impacts on small entities, if any, will result not from regulatory burdens but from the increased scope for operation of market forces. Avoiding impacts of this type is not the intent of the Regulatory Flexibility Act.

In any event, we conclude that adverse impacts that may be experienced by small entities as a result of this proceeding are outweighed by the public benefits of the improved transportation service, lower overall rate levels, and better car use that we expect to result from the action we are taking.

One point deserves particular emphasis in this decision. As has already been noted, the statutory history makes it abundantly clear that we are not to be hesitant in exercising the exemption power in section 10505. Indeed, we have been "charged with the responsibility of actively pursuing exemptions." But we have also been instructed "to adopt a policy of reviewing carriers' action after the fact to correct abuses of market power." (See note 12, *supra.*) The public should be apprised that we have every intention of reviewing this matter, and we wish to leave no doubt that we will correct problems should they develop as we gain experience under this exemption.

Energy and environmental considerations.—An Environmental Assessment prepared by the Commission's Section of Energy and Environment was published December 7, 1982.[52] The assessment was premised on a "worst case" assumption that the exemption would result in diversion to motor carriers of all boxcar traffic earning less than 125 percent of variable cost or moving less than 700 miles, that is, 11.5 percent of boxcar traffic nationwide. The projected consequences were increases in fuel consumption, highway accidents, and emissions of air pollutants.[53] Because the increases were small in comparison to national base line

[51] Public Law 96-354, section 2(a).

[52] 47 F.R. 54985.

[53] On an annual basis, the projected increases were as follows:

Fuel consumption	133,514,957 gallons
Highway accidents	5,630 occurrences
Air pollutant emission:	
Carbon monoxide	9,308,838 pounds
Hydrocarbons	1,326,587 pounds
Nitrogen oxides	38,502,065 pounds

figures, the assessment concluded that they would not be significant. No public comments were received in response to the assessment.

We emphasize that the traffic diversion assumptions in the assessment are highly unlikely to occur. In fact, we anticipate little, if any, net diversion to trucks. While some unprofitable boxcar traffic may be shed as a result of increased pricing flexibility, we think this effect will be minor, because railroads can already lawfully raise their rates on all traffic to profitable levels. Some of the traffic now earning ratios below 125 percent and moving less than 700 miles may be regarded as desirable by the railroads.[54] If they become stronger competitors as a result of this exemption, they should be able to avert losses of this traffic that might otherwise occur. A major objective of the exemption is to allow boxcar service to compete with trucks. The degree to which this objective will be achieved may be difficult to quantify beforehand. Nonetheless, we confidently expect that any boxcar traffic lost to trucks as a result of this exemption will be more than offset by boxcar traffic gains.

The Environmental Assessment recognized the possibility that the exemption could result in diversion of traffic from motor carriers to railroads. In that event, the environmental impacts could take the form of increased delays for motorists at rail crossings and increased rail yard noise and congestion. These would be the trade-offs for decreases in truck-generated air pollutants and reductions in highway congestion and deterioration.

The assessment did not separately evaluate the environmental consequences of exemption effects other than rate changes. These include possible changes in divisions of revenue between connecting carriers on through movements and new charges for storage or return of empty cars. To the extent that these changes help preserve boxcar service and make it more competitive, they should lessen future diversion of boxcar traffic to trucks, thus minimizing any possible adverse environmental consequences associated with such diversion. Moreover, assuming that the car charges reduce unnecessary empty mileage, there should be some reduction in railroad fuel consumption and rail yard congestion.

We conclude that the effects of the boxcar exemption, being no greater than those projected in the assessment and very likely less, will not be environmentally significant. From the energy perspective, the same reasoning applies. The assessment's worst case analysis projects an increase in fuel consumption, but a decrease is more likely, based on reduced diversion of boxcar traffic to trucks and less unnecessary movement of empty equipment. Thus, the impacts of the exemption on

[54] While this traffic may not make a pro rata contribution to coverage of the carriers' fixed costs, even a small contribution is better than none.

energy efficiency and energy consumption, although not readily quantifiable, are most likely to be beneficial.

I. FINDINGS AND ORDER

We find that except to the extent we reserve jurisdiction, continued regulation of railroad boxcar service under 49 U.S.C. Subchapter IV is not necessary to carry out the transportation policy of 49 U.S.C. 10101 or to protect shippers from the abuse of market power, and consequently that an exemption must be granted under 49 U.S.C. 10505.

This action does not significantly affect the quality of the human environment or the conservation of energy resources.

CHAIRMAN TAYLOR dissenting:

A thoughtful review of this decision, wherein the exemption of rail traffic moving in boxcars is approved, can only lead to the conclusion that the grant of such exemption is based upon wishful thinking and unverifiable predictions and assumptions, all of which rely more on theory than fact. This Commission has been charged by Congress with the duty of rationally deregulating the railroad industry in a manner consistent with the national rail transportation policy. To this end, we have been given standards to consider, but reasonable conclusions predicated upon such standards cannot be drawn in the absence of adequate supporting evidence.

Advocates of the exemption in this proceeding consist of one railroad,[55] two Government agencies, and a handful of shippers, most of whom do not even use boxcars. On the other hand, a multitude of parties opposed the exemption by the submittal of an enormous body of evidence demonstrating the fallacies inherent in the proposal. These parties included the railroads themselves (except for the SP on the rate issue) and the general thrust of their opposition was that the boxcar exemption will radically alter both financial and operational relationships throughout the entire railroad industry. Accordingly, those opposing the exemption comprise virtually every group which participates in or depends upon our national railway system.[56]

[55] The SP and its subsidiary the St. Louis Southwestern Railway Company support only the rate exemption.

[56] It bears repeating here that denial of this proposed exemption was supported by: (1) Two branches of the Government, the Departments of Defense and Agriculture, which, as large shippers, have legitimate commercial interests in the rail transportation business; (2) The Association of Western Railways, (including the Chicago & North Western Transportation Company, Burlington Northern Railroad Company, Denver & Rio Grande Western Railroad Company, Green Bay & Western Railroad Company, Illinois Central Gulf Railroad Company, Atchison, Topeka & Santa Fe Railway Company, Elgin, Joliet & Eastern Railway Company, Missouri-Kansas-Texas Railroad Company, Soo Line

(footnote continued on next page)

Moreover, this exemption is totally unlike any other proposed by either the Commission or the railroad industry. It cannot be compared with a commodity exemption which deals with individual products moving in specific markets, thereby allowing for a rational analysis of the probable effects of the exemption.[57] Nor can the TOFC/COFC exemption serve as precedent, since that exemption was specifically supported by the Staggers Act, 49 U.S.C. 10505(f), and its legislative history.[58]

To grant the exemption, the Commission must make certain findings in accordance with the statutory criteria set forth in 49 U.S.C. 10505 based upon the evidence of record. The almost complete lack of positive response to this exemption, coupled with the embarrassing paucity of supporting evidence, should have led to the conclusion that the proposal under consideration fails to satisfy any of the criteria of section 10505. Consequently, a denial was clearly mandated, because the Commission cannot make the requisite findings to grant the exemption.

The Statutory Criteria of 49 U.S.C. 10505(a)(2)

Limited scope:

No one has made a serious effort to argue that a proposal affecting 40 percent of the total car-miles in the U.S. is of limited scope. Various parties have noted that the exemption would encompass 25 percent of the national railcar fleet, 22 percent of the country's rail traffic, 25 percent of Conrail's total traffic, and 90 percent of the major commodity groups. Of the 35 major commodity classifications, 34 have boxcar movements. Of these 34, 14 move by boxcar at least 50 percent of the time. In 1981, there were 3,237,676 boxcar shipments in this country, and boxcar traffic accounted for 42 percent of total rail movements into and out of the eastern territory. Conrail originates and terminates more boxcars than

(footnote 56 continued)
Railroad Company, Missouri Pacific Railroad Company, Western Pacific Railroad Company, Kansas City Southern Railway Company, and Union Pacific Railroad Company), one-third of the individual class railroads and about 20 short-line railroads. (The American Association of Railroads also opposes the car service/car hire portion of the exemption.); (3) Eleven State and local agencies; (4) Nine private carowners; (5) Over 70 shippers, associations, and nonrail carriers; and (6) Numerous members of Congress.

[57] The railroads themselves have stated that the most logical and reasonable approach to exemptions is by commodity and not car type.

[58] See H.R. Rept. 1035, 96th Cong., 2d sess. 60 (1980). Further, the special nature of TOFC traffic makes it highly competitive and versatile. TOFC/COFC operations are from a limited number of ramp origins to a limited number of ramp point destinations. In 1980, the number of boxcar loads shipped was about 200 percent of the TOFC carloadings. The predominant rate form for TOFC is FAK (Freight all kinds) and the commodity is the trailer—usually a 40 foot van. There is generally no rate differential on different kinds of goods sealed in the trailer. This enables shippers to switch modes at whim, and provides built-in controls against abuses and excessive rates.

any other railroad and has control over one out of every six boxcar shipments. Conrail serves 2,690 stations in the Northeast. These stations serve industrial areas which turn out 84 percent of the manufactured goods produced in that section of the country. Conrail also loads and unloads 54.1 percent of all boxcar traffic in that section. In light of these figures, a limited scope argument is clearly not available.

Abuse of market power.

Nor can an appropriate finding be made with regard to the abuse of market power criterion. To determine whether market power is likely to be abused, an adequate definition of the market is necessary. But product markets are defined by commodities not car types, and it is the contents of a car, not the car type, that competes on the open market. The fundamental premise of the exemption proposed herein is that all commodities (except nonferrous recyclables), when transported in boxcars, move competitively. This assumption requires an enormous leap of faith, as boxcar freight is exceptionally diverse. It covers a wide range of commodities, rates, competitive situations, characteristics, locations, and destinations, all of which go into the definition of a market. Because of the lack of focus of this proposal, it is not possible for the Commission to make a finding that the application of every rate provision of the Interstate Commerce Act is no longer necessary for all boxcar transportation.

Even were such a finding possible, the complete inadequacy of the record precludes the Commission from drawing the necessary conclusions.[59] The evidence presented by Conrail does not reflect or represent the rest of the country outside the Northeast.[60] The Northeast differs from the rest of the country in number of cars terminated, manufacturing output, level of consumption, population, length of haul of shipments, and efficency of rail carriers. The nationwide statistics on which the majority relies to fill the gaps are well over 6 years old.[61] Moreover, the majority decision doesn't even attempt to show that these studies, conducted during the restrictive era of rail regulation, bear any relationship to the current railroad industry, which has changed so remarkably in the last few years, especially since enactment of the Staggers Act.

[59] Compare the aggregated data for the Northeast supplied by Conrail in this proceeding with No. 38676, *Changes in Routing Provisions—Conrail—July 1981*, 365 I.C.C. 753 (1982) (remanded, *Chesapeake and Ohio Railway Co. et al.* v. *United States of America*, 7th Cir. Nos. 81-2286, 82-1625, and 82-1693 (April 4, 1983). The court held that there was not substantial evidence to support the conclusion that certain joint rate cancellations were consistent with the public interest because, among other things, the Conrail study on which the Commission relied heavily was deficient since (i) it considered only some of the traffic, i.e., that on which Conrail was a terminating carrier, and (ii) it was in grossly aggregated form).

[60] See appendix A, note 1 of majority decision.

[61] See appendix B, note 1, 2 and appendix C, note 1 of majority decision.

Also, much traffic that now moves in boxcars tends to be inherently rail oriented. But the broad brush methods of support used here ignore all but the most general figures. In spite of the fact that the Commission specifically requested disaggregated data to determine which markets were competitive, Conrail chose to rely on the Reebie study which is not broken down further than the three-digit Standard Transportation Commodity Code (STCC). At this level, the data are too generic and not specific enough to enable an adequate analysis of the competition in any particular market.[62]

Another major objection to this proposal is that many commodities, which can be regarded as "boxcar traffic," also move in other types of railroad equipment, and such commodities will now compete in the same markets when moving in different types of railroad equipment. This situation presents the substantial likelihood that the deregulation of those commodities, when moving in boxcars, will affect their marketing merely because of an anomaly of regulatory policy.

A perfect example is the movement of grain, soybeans, and sunflower seeds. In cur recent decision in Ex Parte 346 (Sub-No. 14), *Rail General Exemption Authority—Miscellaneous Agricultural Commodities* (not printed), decided February 17, 1983, we specifically declined to include grain and soybeans. After considerable analysis, however, we also concluded that sunflower seeds should not be exempted. Now, with only a brief reference by the majority to grain generally, all these commodities will be exempt when transported in boxcars. Such an obvious undoing with the left hand of what the right hand has done is nonsensical to say the least.

Different rules and rates for different types of equipment surely will lead to a distortion in the demand for certain cars, because equipment choices will be influenced by the boxcar exemption rather than the efficiencies and benefits of particular equipment relative to any given movement. This is a special concern of shippers, because even though they may request a specific type of equipment, if they receive an unregulated boxcar, their choice may be to accept it or face, unacceptable delays in receiving the requested equipment. It is ironic that this so-called "deregulatory" proposal will, in actuality, interfere with decisions based on natural market forces and perhaps even encourage the continued use of equipment which many in the railroad industry believe is eventually destined to become obsolete.

[62]For example, STCC 331 covers steelworks, rolling mill or other reduction plant products. The STCC is then further divided into 245 separate commodity groups. Another example is STCC 204, grain mill products, which, as Conrail has shown, travels 41.5 percent in boxcars. However, when this is expanded to the four-digit level, there are six separate subgroups with boxcar shares of from 11.5 to 97.2 percent!

Thus, the proposed exemption fails the tests of both sections 10505(a)(2)(A) and (B). It is not of limited scope, and the record cannot support a finding that there will not be an abuse of market power, because there is no evidence to determine what the market is.

The Modified Car Hire/Car Service Proposal

To fully consider the relationship of this exemption to the statutory criteria and the national rail transportation policy, it is first necessary to discuss the serious problems raised by the grant of the modified car hire and service proposal.

If the car hire and car service issues occupy such a prominent place in the record, it is with good cause, as they lie at the heart of this Conrail-initiated proceeding, which is really concerned with how the car hire and distribution system has worked and how it should work. Under the current system, both the provider and user of cars are restricted in their decisionmaking. The owner has no control when the car is off-line, and users are restricted in terms of car supply availability. Therefore, it has been properly argued that some effort should be made to move toward a more market-based system.

The problem with the modified Conrail proposal,[63] as I see it, is that while the individual steps proposed, taken in isolation, seem to be key ingredients of a market-based system, when superimposed over the current system, they turn out to be logically incompatible.

Consider first the imposition of empty mileage charges and reclaim per diem after 3 days. This puts using roads in a position to make car use decisions that affect a third party's costs. Using roads will control whether the owning road incurs empty movement charges, on excess cars to remote points, by deciding what cars to load for given shipments.

This is the key to the objections registered by both large and small carriers. As the majority recognizes, short-line railroads will be severely affected by Conrail's modified proposal. For instance, a short line could purchase cars for the use of its shippers and then load these cars for termination on another line in the same region. But that latter line could then send the reloaded cars thousands of miles away. If the original road needed the cars for its shippers, it would have to pay the empty mileage charge to secure return.

[63] I would like to point out that the notice of this proposal was made under the auspices of 49 U.S.C. 10505, which authorizes exemptions from regulation. This proposal, which will authorize the authority to assess charges at certain levels and to store empty cars while reclaiming car rental charges, is a regulation—not an exemption. Certainly 49 U.S.C. 11122 would permit such regulations, but only after proper notice. Respondents who commented on this proposal, as noticed by the Commission under section 10505, were clearly denied the opportunity to address it under section 11122. These sections have different purposes and different standards. The courts have consistently found procedural defects of this nature to be fatal for lack of proper notice.

Another problem of even greater magnitude for the short lines is that their share of the freight revenues may not even equal the empty mileage charges assessed. The long-haul road, on the other hand, will receive the benefit of both the greater share of the revenue plus all the empty mileage charges. In many instances, it would even be to the holding road's advantage to move this equipment the longest route possible in order to maximize the mileage charges. Moreover, it certainly seems peculiar to allow a terminating carrier to assess demurrage on shippers who do not timely release cars, and then allow such terminating carrier to also assess charges on the carrier that owns the cars once they are empty. Whether the short lines can survive until they reach the majority's nirvanha of having equal bargaining power with Conrail is indeed problematical.

Keeping in mind the Commission's retention of reciprocal switching obligations, the majority's effort to graft a little "free market" onto regulation can be expected to produce some serious difficulties. Regardless of whether there is an agreement between the parties, compulsory interchange will require Conrail and other roads to accept whatever car is tendered for further movements—no matter what its expense. The receiving road cannot refuse to accept a car.

Equally shakey are the majority's predictions regarding the incentive to own boxcars. 49 U.S.C. 11122(a) requires the Commission to encourage the purchase, acquisition, and efficient use of freight cars. However, the investment risk that owners would be subject to by virtue of Conrail's modified proposal is clearly unwarranted, especially as control of the cars has not been offered as a *quid pro quo*. One does not move in and out of the freight car business on short notice. Any disincentive to invest in freight cars can result in later shortages, since there is a built-in timelag of many months between the time a car is ordered and the time it is delivered.

High car costs and empty car-miles are an important concern, not only to Conrail, but also to many other railroads. The solution is not to reward one at the expense of all the others. Clearly, a process which penalizes owners, be they shippers, railroads, or third parties (who after all are largely supplying the debtor roads such as Conrail with car capacity) is not what Congress envisioned. The Commission, the AAR, and all other interested parties should be directing their efforts toward finding an overall solution, not a makeshift one.

The Rail Transportation Policy of 49 U.S.C. 10101a

After considering all the individual issues in an exemption proposal, the Commission must then bring them together for a balancing of the many goals set forth in the national rail transportation policy.

The broad policy arguments used to support the exemption herein proposed are the same ones that are generally relied upon to support every deregulatory action, *e.g.*, less paperwork and pricing flexibility. However, the necessity of individual agreements with every shipper and carowner should more than offset the reduced amount of paperwork that must be filed with the Commission, and without resort to the exemption, an abundance of price flexibility is already available under the current statutory system. With particular reference to pricing flexibility, one need only review the many protests and complaints filed in the last year by shippers and carriers regarding cancellations of joint rates and routes to understand that existing flexibility is already producing serious shipper and carrier concern.[64] Thus, the majority is correct that the exemption will eliminate, at least with respect to boxcar movements, "litigation and other expensive procedural obstacles" placed in a railroad's way by Congress. In any event, such general "benefits," even if balancing allows them to be characterized as such, cannot outweigh the needs of our national rail system as a whole.

The goal of the national rail transportation policy is to promote and ensure the continuation of a healthy railroad system. To this end, regulation is recognized as a legitimate function of the Federal Government to (i) prevent discrimination against shippers or connecting carriers, (ii) facilitate the establishment of single factor through rates, (iii) publicize rail rates, (iv) assure shippers that traffic will move efficiently, and (v) provide incentives for investment.

49 U.S.C. 10101a, subparagraphs (1), (3), (4), (5), and (6), emphasize the importance of competition, stress the need for reasonable rates and adequate revenues, and accentuate the necessity of maintaining a financially sound and integrated rail system. However, the very nature of the boxcar exemption is inapposite to all these goals. True competition relies on a rational system of decisionmaking based upon market realities—not on whether a commodity moves in a boxcar. Reasonable rates and adequate revenues should go together to benefit both shipper and carrier—and not just Conrail. Ratemaking decisions should be based on more than the type of equipment used. In addition, it cannot be said that the proposed exemption will encourage equipment investment or the efficient movement of traffic. What can be predicted is that boxcars will simply become the joker in the deck, with their own special compensation rules grafted onto the current system.

The national rail transportation policy also instructs the Commission to cooperate with the States on transportation matters. 49 U.S.C.

[64] See, for example, No. 39176, *The Chlorine Institute, Inc. v. Atchison, Topeka & Santa Fe Railway Co., et al.*; No. 38676, *Changes in Routing Provisions, supra*, note 5.

10101a(9). In spite of having recently forced the States to accede to Federal exemptions as the price for certification of intrastate railroad jurisdiction, the majority has not even attempted an analysis of the effect of this massive boxcar exemption on intrastate rail transportation.

Certainly the proposed exemption will not encourage (per 49 U.S.C. 10101a(10)), the elimination of noncompensatory rates, as many smaller carriers will be forced to that level to retain any traffic at all. Nor can it be argued (per 49 U.S.C. 10101a(13)) that the proposed exemption will prohibit predatory pricing and practices, avoid undue concentrations of market power, and prohibit unlawful discrimination, because there will be no forum to which a carrier or shipper may bring a complaint. Lastly, contrary to 49 U.S.C. 10101a(4), the proposed exemption will seriously endanger our rail transportation system, whose healthy continuation Congress, through its stated policy, wishes to maintain.

Summary

I have strongly supported and openly invited resort to the Commission's exemption authority as a means of leading, perhaps even pushing the railroad industry toward more reliance on themselves and the marketplace. To date, I believe such efforts have been crowned with success, in that the industry's requests for exemptions, together with the Commission's responses, have been genuinely responsible in every instance that comes to mind. Today, however, the majority has mandated a step backward by allowing deregulatory zeal to impose an unworkable system on an unwilling public. This is the kind of irresponsibility which can only serve the interests of those who are patiently searching for reasons to justify reregulation. I deeply regret the ammunition provided by the majority's decision in this proceeding.[65]

[65]On February 28, 1983 former Commissioner Simmons submitted the following separate expression:

A grant of Conrail's exemption from regulation of rates on boxcar traffic files in the face of the evidence of record and the criteria of section 10505.

Of particular concern to me is that no persuasive arguments have been raised which demonstrate that we can state for certain that there is absolutely *no* potential for abuse of market power. The Commission is required to make an affirmative finding that continued regulation is not needed to protect shippers from the abuse of market power. A number of shippers have presented persuasive data to demonstrate that the likelihood of market power abuse is great on a significant amount of traffic. Conrail and other supporters of the exemption have not amply contradicted those assertions. Instead, Conrail has submitted evidence limited to the Northeast and fails to present any picture of the country as a whole or of specific classes or types of commodities.

An exemption of boxcars from car hire and car service regulation would not be consistent with the national rail transportation policy. The evidence suggests that such an exemption would only serve the parochial interests of Conrail at the expense of the shippers, the other railroads, and the public.

It is ordered:

1. The rail transportation of all commodities in boxcars is exempted from the provisions of 49 U.S.C. Subtitle IV to the extent provided in appendix D to this decision.

2. Notice of our action shall be given to the general public by publication of a summary of this decision in the Federal Register.

3. This decision will be effective 6 months from the date of Federal Register publication.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre, Simmons, and Gradison. Chairman Taylor dissented with a separate expressions.

(SEAL)

AGATHA L. MERGENOVICH,
Secretary.

APPENDIX A

Boxcar market shares and profitability[1]

Commodity		1980 tons	Boxcar share	Truck share	Movements over 1,000 miles		Shipments over 60K pounds		Conrail rev/vc
STCC	Name				Category size	Boxcar share	Category size[2]	Boxcar share	
			Percent	*Percent*	*Percent*	*Percent*	*Percent*	*Percent*	
203	Canned food	17,726,000	22.1	75.7	30	47.6	24.7	86.1	0.97
204	Grain mill products	29,971,000	22.5	40.5	13	25.9	51.1	33.3	1.07
208	Beverages	37,899,000	11.7	83.6	7	64.5	16.2	52.4	1.06
209	Soybean products, miscellaneous food products	42,073,000	6.0	69.6	7	30.7	63.2	10.2	1.00
242	Lumber	3,789,000	28.8	33.2	40	54.8	82.3	38.9	0.90
243	Millwork	5,583,000	37.4	61.5	27	90.2	38.6	86.1	0.97
249	Particle board	6,658,000	15.5	75.6	12	51.5	29.8	38.8	1.10
261	Pulp	3,002,000	85.3	10.0	19	96.5	98.0	95.2	1.22
262	Paper	15,098,000	39.6	58.7	17	66.0	40.3	93.6	1.18
263	Paperboard	10,193,000	75.5	23.0	15	93.2	83.2	96.4	0.92
264	Converted paper	7,824,000	36.9	62.3	22	46.7	5.9	67.4	0.94
281	Industrial chemicals	55,954,000	1.9	46.2	22	3.8	56.8	3.0	1.14
325	Structural clay products	10,557,000	19.1	80.0	4	62.8	29.2	52.4	1.10
329	Abrasives and asbestos	34,734,000	5.9	76.9	7	30.6	59.5	N[3]	1.12
331	Steel mill products	109,187,000	1.8	65.3	7	8.6	45.2	3.5	1.11
333	Nonferrous metal products	7,367,000	31.9	51.1	23	63.2	48.2	54.9	1.36
335	Nonferrous metal shapes	9,471,000	13.6	83.8	16	38.7	16.2	68.8	1.41
371	Auto equipment[4]	37,302,000	26.6	56.3	14	29.3	19.1	66.1	1.54

[1]Market share data derived from Reebie Associates Commodity Profiles for traffic originating and/or terminating in the Northeast. Revenue/variable cost ratios from M S. Sanders' exhibit III.

[2]Percentages of those shipments for which shipment size is specified in the data base (generally 70-95 percent of total shipments).

[3]N = neglibible. Records on nearly half the tonnage for this commodity group did not specify shipment size, so conclusions related to shipment size cannot be reliably drawn.

[4]Includes both vehicles and parts. Specific conclusions on boxcar traffic (auto parts) cannot be drawn from these data.

APPENDIX B

Modal share of three-digit STCC commodities: ranked by percent of rail tons moved by boxcar

Commodity code	Commodity	1977 tonnage all modes[1] (000s)	Percent of tonnage by mode (1977)[2] Rail	Truck	Other
263	Fiberboard, paperboard or pulpboard	27,629	67	30	3
264	Converted paper or paperboard products	14,728	35	62	3
262	Paper	30,768	49	44	7
325	Structural clay products	24,218	24	76	0
301	Tires or inner tubes	5,067	39	60	0
243	Millwork or prefabricated wood products	26,258	34	62	4
261	Pulp or pulpmill products	9,381	58	21	21
335	Nonferrous metal basic shapes	13,213	18	81	1
266	Building paper or building board	2,618	29	66	5
249	Miscellenous wood products	23,967	29	69	2
333	Nonferrous metal primary shelter products	13,986	42	52	6
371	Motor vehicles	50,734	49	47	4
242	Sawmill or planing mill products	60,707	26	70	4
204	Grain mill products	109,538	37	61	2
206	Sugar, beet or cane	21,036	32	56	12
208	Beverages or flavoring extracts	80,713	17	82	1
402	Waste or scrap	N/A	N/A	N/A	N/A
329	Abrasives or asbestos products	56,985	36	64	1
203	Canned or preserved fruits	36,825	27	69	4
289	Miscellaneous chemical products	23,421	22	71	8
282	Plastic materials	29,733	44	52	4
209	Miscellaneous food preparations	69,557	29	64	7
011	Field crops	N/A	N/A	N/A	N/A
331	Steelworks or rolling mill prducts	130,195	36	60	3
281	Industrial inorganic chemicals	197,352	33	39	28

[1] [2] 1977 Census of Transportation, *Commodity Transportation Survey.*

NOTE: Mode shares may not sum to 100 due to rounding.

APPENDIX C

Boxcar commodities with some r/vc ratios exceeding 180 percent[1]

SPC code	Commodity	Percent in boxcars[2]	Traffic exceeding 180 percent r/vc[3]
		Percent	
1	Cotton	94.4	13.4
27	Phosphate fertilizers	10.2	18.9
30	Canned fruits and vegetables	90.9	5.6

See footnotes at end of table

Boxcar commodities with some r/vc ratios exceeding 180 percent[1]—Continued

SPC code	Commodity	Percent in boxcars[2]	Traffic exceeding 180 percent r/vc[3]
		Percent	
31	Other canned footstuffs	92.9	5.3
32	Frozen fruits and vegetables	97.9	7.8
33	Wheat mill products	50.6	6.0
34	Dry cornmill products	64.7	33.3
35	Other grain mill products	60.1	12.6
37	Cereal preparations	99.6	6.7
38	Sugar	31.3	30.7
39	Malt liquors	98.4	11.6
40	Wines and brandy	75.4	1.4
44	Tobacco products	96.0	1.6
45	Textile products	72.0	0.5
48	Lumber	42.9	11.5
51	Millwork	96.3	5.0
52	Plywood	97.1	14.2
54	Particle board	83.7	17.9
55	Furniture	91.4	2.5
56	Woodpulp	97.8	24.1
57	Newsprint	98.5	63.6
58	Ground wood paper	98.5	19.8
59	Printing paper	91.7	14.9
60	Wrapping paper	97.6	19.5
61	Pulpboard	98.6	14.7
62	Pulpboard, corrugated	98.7	26.1
63	Sanitary paper products	99.2	4.7
64	Paperboard boxes	96.9	10.2
65	Food containers	93.0	7.4
66	Building paper	81.5	6.3
76	Agricultural chemicals	12.5	28.7
78	Rubber	72.2	46.4
79	Detergents	54.9	18.2
86	Construction materials	84.3	21.6
89	Tires	92.1	13.5
90	Plastic products	96.0	11.6
93	Bricks	95.2	1.9
94	Clay refractories	94.6	12.6
97	Mineral wool	95.1	10.9
104	Primary copper products	56.0	53.6
105	Primary zinc products	100.0	36.2
106	Primary aluminum products	61.1	47.8
107	Brass shapes	64.7	49.2
108	Aluminum shapes	76.1	50.7
109	Metal containers	71.1	20.2
112	Major appliances	81.7	25.6
116	Motor vehicle parts	94.3	52.3
119	Nonferrous metal scrap	70.7	30.7
120	Textile waste	97.2	2.1
121	Paper waste	99.0	6.6
123	Shipping containers	60.6	5.4

[1]Excerpted from Robert L. Banks' table 9, based on A. T. Kearney study of April 29, 1977.

[2]Percent of rail traffic, not of total commodity traffic. Most commodities below 50 percent and fresh fruits and vegetables omitted.

[3]Percent of rail traffic between points in U.S.

APPENDIX D

Chapter X of Title 49 of the Code of Federal Regulations is amended by the addition of a new section 1039.14 as follows:

1039.14 BOXCAR TRANSPORTATION EXEMPTION

(a) The rail transportation of all commodities in boxcars is exempt from the provisions of 49 U.S.C. Subtitle IV except as otherwise provided in this section.

(b) The Commission retains jurisdiction in the following areas:

(1) Car hire and car service.

(2) Mandatory interchange of equipment.

(3) Reciprocal switching or joint use of terminal facilities.

(4) Car supply.

(5) Rates for the transportation of recyclable or recycled materials other than iron and steel.

(6) Freight carpooling agreements.

(c) Rail carriers are authorized to take the following actions with respect to boxcar equipment use:

(1) Assess charges for empty movement of cars where movements are made at the request of the carowner, the Association of American Railroads, or the Commission. The empty mileage charge is subject to a maximum of 35 cents per mile, as adjusted for inflation or deflation using the rail cost adjustment factors published periodically by the Commission in Ex Parte No. 290 (Sub-No. 2), *Railroad Cost Recovery Procedures*. In applying those factors, the figure of 35 cents shall be treated as having been in effect on October 1, 1982.

(2) Store empty cars and reclaim car hire payments beginning at the expiration of a 72-hour grace period after the car is made empty.

(3) Negotiate bilateral agreements governing car hire rates, empty movements, and storage.

(d) Carriers must continue to comply with Commission accounting and reporting requirements. Railroad tariffs pertaining to the exempted transportation of commodities in boxcars will no longer apply. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Commision. (Authority 49 U.S.C. 10321(a), 10505 and 11122.)

APPENDIX E

Served November 3, 1983

31473

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 346 (SUB-NO. 8)

EXEMPTION FROM REGULATION—BOXCAR TRAFFIC

TABLE OF CONTENTS

Ex Parte No. 346 (Sub-No. 8)

EXEMPTION FROM REGULATION—BOXCAR TRAFFIC

Decided October 21, 1983

The Commission's decision to exempt from regulation the freight rates on most boxcar service and to permit specified actions affecting boxcar rental charges is reaffirmed. Petitions for reconsideration of the decision are denied.

Decision

By the Commission:

I. Introduction

On May 2, 1983, we issued a written decision[1] exempting railroad boxcar service from regulation of freight rates and partially exempting boxcar rental charges from observance of car hire rates that we prescribe.

We have received more than 70 pleadings of various types.[2] Most of the pleadings are from short-line railroads opposing the car hire aspects of the exemption. A few major railroads, car leasing companies, and shippers also submitted pleadings in opposition to the car hire exemption. The Department of Transportation (DOT), the Consolidated Rail Corporation (Conrail) and the Southern Pacific Transportation Company support the decision, although DOT suggests a separate proceeding to deal with certain boxcars owned by class III railroads. Only scattered comments were received on our decision to exempt boxcar freight rates, the most detailed having been submitted by water carriers opposed to exemption of the boxcar service provided by the Alaska Railroad (ARR).

We granted the exemption because continued regulation of boxcar service, with minor exceptions,[3] is no longer necessary, and deregulation

[1] *Exemption From Regulation—Boxcar Traffic*, 367 I.C.C. 424 (1983) (*Boxcars*).

[2] Petitions for reconsideration, petitions for stay, and replies, in addition to a number of letters.

A petition for further hearing was filed by Central Vermont Railway, Inc., et al. Central Vermont's argument that the decision is inconsistent with 49 U.S.C. 11122 is treated in part III.D. of this decision. We do not regard the decision as confiscatory, so as to require a due process hearing, for the reasons explained in part III.H. Since we received three rounds of comments and held oral argument before issuing our decision and now have received extensive petitions for reconsideration, no useful purpose would be served by a further hearing of any other nature. The petition is denied.

[3] We retained jurisdiction over boxcar freight rates on nonferrous recyclable materials, and on car hire and car service matters except as discussed in part III.B. of this decision.

is essential to restore the viability of this service. Although boxcars have been the mainstay of rail freight handling equipment, recent decades have seen a steady decline in their use. As competition from the trucking industry has become ever stronger, boxcar service has lost much of the truck compatible traffic and has lost varying amounts of the remainder of the traffic that historically moved by boxcar.[4] This trend will not be arrested unless the railroads can enhance the attractiveness of boxcar service through cost reduction and more flexible pricing. The exemption will make these possible.

II. THE FREIGHT RATE EXEMPTION

We exempted virtually all boxcar service from freight rate regulation, finding, as required by 49 U.S.C. 10505(a), that continued regulation was not needed to carry out the rail transportation policy of 49 U.S.C. 10101a or to protect shippers from abuse of railroad market power.[5] The major question raised on appeal concerns the applicability of the freight rate exemption to the ARR.

A. *Exclusion of Alaska Railroad.*—In exempting boxcar freight rates, we found, among other things, that continued regulation was not necessary to prevent predatory pricing (i.e., below-cost pricing aimed at elimination of competitors). We specifically found that predatory pricing on the part of the ARR was highly unlikely.[6]

Sea-Land Service, Inc. (Sea-Land) and Totem Ocean Trailer Express, Inc. (Totem) contend that they are potential victims of predation by ARR and seek its exclusion from the exemption. They offer transportation between the west coast and Alaska that competes, to some degree,[7] with the service of ARR. Totem transports trailers in "Ro-Ro" (roll on/roll off) vessels and Sea-Land transports containers in container ships. They connect with Alaskan motor carriers or with ARR's TOFC/COFC service. ARR operates only within Alaska. It handles traffic from the west coast in conjunction with Alaska Hydrotrain, which transports rail cars on barges. ARR's water/rail service handles less than 25 percent of the Alaska trade. Sea-Land carries about 45 percent, and Totem about 25 percent. Sixty-five percent of ARR's traffic moves in boxcars.

Sea-Land's strongest argument is that the Commission is precluded from exempting ARR's boxcar service by a court decision which disap-

[4]Some former boxcar traffic has migrated to other types of rail equipment, such as covered hopper cars (in the case of grain) or trailers and containers on flat cars (TOFC/COFC service).

[5]*Boxcars* at pp. 426-46.

[6]*Boxcars* at pp. 441-2.

[7]The commodities carried by the ARR tend toward bulk while that of Sea-Land and Totem tend more toward time-sensitive shipments. They compete for traffic such as lumber, sheetrock, plywood, insulation, drilling mud, drill pipe, dry groceries, general machinery, fabricated and unfabricated iron and steel, canned fish, roofing material, soda pop, newsprint, animal feed, and fertilizer.

proved exemption of ARR's TOFC/COFC service.[8] We have closely examined the factors that were cited by the court in light of additional facts and changed laws available on the present record. In our view, they do not show that continued regulation of ARR's boxcar service is necessary to prevent predatory pricing.

The first problem cited by the court in TOFC/COFC is that ARR is government-owned and subsidized. The court concluded that, even if deregulated, ARR's rates will not be controlled by competitive market forces. For clarity in discussing this point, we think that the market forces which control rate increases must be distinguished from those which control rate decreases. In a free market, rate increases are controlled by competition because a purchaser can refuse to pay an increased rate if a substitute service is available more cheaply from a competitor. We think there can be no doubt that ARR's power to impose rate increases is strictly controlled by the existence of competitors, regardless of its government ownership or subsidies.

Rate decreases in a free market are limited, not by competitive forces, but by a firm's own costs. Government ownership and subsidies are certainly relevant in that they could enable a firm to price below its costs. Whether the subsidy of ARR warrants continued regulation, however, depends on the extent of the subsidy and the nature of our regulation. The subsidy ARR receives is not for freight operating costs, but for capital expenditures and passsenger service costs. This subsidy would be unlikely to lead us to find that particular ARR rates are unlawful. We have no authority to find rates unreasonably low if they cover the costs that vary directly with the level of transportation provided under the involved rate.[9] As we have defined the directly variable cost concept, it includes only the line-haul cost of the lading, applicable switching and station clerical costs, and other costs specifically shown to vary with the level of traffic.[10] Capital costs that do not vary with the level of traffic under the involved rate would not be included.

Even rates below the presumptive cost floor are not necessarily unlawful.[11] ARR's govermental owners, whether Federal or State[12] could well have legitimate reasons of public policy for subsidizing its rates. As long

[8] *American Trucking Associations, Inc.* v. *I.C.C.*, 656 F. 2d 1115 (5th Cir. 1981) (TOFC/COFC).

[9] 49 U.S.C. 10701a(c)(4)(B).

[10] *Cost Standards for Railroad Rates*, 364 I.C.C. 898 (1981).

[11] *Id.* at 902. The presumptive cost floor includes only the line-haul cost of the lading and applicable switching costs and station clerical costs.

[12] A transfer of ARR to the State of Alaska could occur in 1984 under the provisions of the Alaska Railroad Transfer Act (ARTA), Public Law 97-468, 96 Stat. 2577. The Commission has promulgated an expedited modified procedure for providing a certificate of public convenience and necessity on the date of transfer. Ex Parte No. 446, *Alaska Railroad Certification* (not printed), served June 17, 1983. As we (footnote continued on next page)

as this policy was not aimed at driving private transportation companies out of business, it would not be our place to interfere. We see no reason for the Federal government or Alaska to set out to destory Sea-Land and Totem, since the transportation services provided by these companies are beneficial to the State of Alaska. Thus, in our view, even though ARR is government-owned and subsidized, that is an insufficient reason for continued regulation of ARR's boxcar rates.

The second factor cited by the court is that ARR is immune from antitrust laws. The importance of this factor is greatly diminished, however, by the existence of other checks on ARR's abuse of pricing freedoms. At the present time, as a federally-owned railroad, ARR is subject to close scrutiny by Congress and by DOT. It could not begin to engage in the kind of drastic price cutting that would undermine the viability of its competitors without arousing immediate reactions from those with ultimate control over it. The Commission, can readily revoke ARR's exemption and step in if ARR were to engage in a campaign of true predation against its competitors. Moreover, once the ownership of ARR is transferred to the State of Alaska, it will be subject to the antitrust laws.

The third factor, which understandably may have carried the most weight with the court, was Congress's then-recent direction that the Commission investigate whether ARR's rates were predatory. The court held that the Commission had included ARR in the TOFC/COFC exemption in the face of this congressional concern about possible predation. Even though the Commission had concluded a study[13] showing that ARR's rates covered its costs of service, the court noted that Congress had not yet had time to respond to the study. The passage of time has placed this particular circumstance in a different light. Congress has accepted the Commission's rate study[14] and has taken no action that would indicate dissatisfaction with its conclusions.

Beyond the factors that concerned the court, Sea-Land takes issue with our conclusion that, "since there would be no barrier to rapid reentry of competing water-motor service, ARR could not enjoy a sustained period of post-predation monopoly pricing." Our point was that ARR would never attempt to eliminate its competitors by below-cost pricing, because it could not later preserve a monopoly long enough to recoup its losses.

(footnote 12 continued)

there noted, the Commission's authority over the federally owned ARR is exercised under Executive Order No. 11107 (superseded July 19, 1983, by Executive Order No. 12434). After the date of transfer to the State of Alaska, we will have statutory jurisdiction as provided in section 608(a)(1) of the ARTA. In each case, we regulate ARR under the provisions of 49 U.S.C. Subtitle IV and other applicable laws. The applicability of certain provisions of the Alaska Railroad Act (ARA) is discussed later in this part of the decision.

[13] Study of Alaska Railroad Water/Rail Contract Rates and Water/Rail Tariff Charge Rates, submitted to Congress June 15, 1981.

[14] See S. Rept. 479, 97th Cong., 2d sess. 10 (1982).

Sea-Land argues that the high cost of ships and terminals would be a major barrier to reentry once competitors were eliminated. We grant that reestablishment of ocean transport operations would not be quite as easy as reentry of motor carriers, but we think Sea-Land overstates the obstacles. Even though ships and terminals are large investments, they would not have to be bought or constructed new by a fresh competitor. Present facilities would not be scrapped by a failing company, but simply sold or leased to other companies or closed down. These facilities would be available to new competitors if ARR attempted to set prices at monopolistic levels. We do not believe that ARR could hope to eliminate companies such as Sea-Land or Totem by predatory pricing before governmental forces would intervene.

Sea-Land next argues that the Commission has no power to exempt *any* service of the Alaska Railroad from regulation even if the criteria of section 10505(a) are satisfied. It bases this argument on a provision in the ARA that the rates fixed by the President for the ARA "shall be equal and uniform." Sea-Land considers exemptions to be inconsistent with that requirement because they would permit ARR to adopt unequal and nonuniform rates.

The requirement that DOT, through authority delegated by the President,[15] establish "equal and uniform rates" for the ARR, does not create a standard to be enforced by the Commission. We regulate ARR's rates under portions of 49 U.S.C. Subtitle IV that are specified by Executive Order.[16] Subtitle IV contains no requirement that rail rates be "equal and uniform."[17] Moreover, even if the "equal and uniform" requirement were a mandate to the Commission, it would not require a regulatory program aimed at predatory pricing. Predation concerns rate levels in relation to costs, not rate uniformity.

As DOT correctly observes, if the "equal and uniform" language prohibited the Commission from exempting a service of the ARR, it would also prevent us from approving the use of contract rates by the ARR, since contract rates can be unequal and nonuniform. Yet Congress itself has acknowledged the existence of ARR contract rates and has not condemned them as inconsistent with the ARA.

Sea-Land also cites a provision in the ARA that the ARR shall "perform generally all the usual duties of a common carrier by railroad." We are unable to see how this provision could require exclusion of ARR

[15] Executive Order No. 12434, section 1.

[16] Executive Order No. 12434, section 3. We issued a notice of voluntary compliance with this new Executive order on July 25, 1983.

[17] The prohibition against unreasonable discrimination in 49 U.S.C. 10741 permits rate discrepancies based on differences in service, traffic, or other circumstances. It does not apply to rail rates applicable over different routes, to contract rates, or to certain other rates.

from an exemption granted to other common carrier railroads. If Congress intended ARR to be subject to stricter Commission regulation than other railroads, it would have so stated explicitly.

In enacting the ARTA, Congress expressed its intention that the ARR shall be given "all business opportunities available to comparable railroads."[18] Similarly, Executive Order No. 12434,[19] under which the Commission now voluntarily regulates ARR rates, provides that "[s]uch rates shall be filed with the Interstate Commerce Commission to the same extent as rates are filed by comparable carriers subject to its jurisdiction." Thus, we see no basis for the view that we are powerless to give ARR the benefit of an exemption that will apply to all other railroads.[20]

Continued regulation of ARR's boxcar operations would serve, not to protect Sea-Land and Totem from predation (for no protection is needed), but to foreclose ARR from efficiency gains that would make it a more effective competitor in the normal course of business. Certainly, we would not exclude ARR from the exemption to serve that objective. Neither transportation law nor Commission policy is offended by bona fide competition that is not predatory in nature. While Sea-Land and Totem may have to work harder to defend their present dominant share of the Alaska trade, we see no reason to fear that the exemption will lead to their disappearance from this market.

B. *Other freight rate exemption issues.*—One of the arguments made by several carriers in the initial comments was that the Commission should grant exemptions by specific commodities rather than granting a broad exemption for all traffic transported in boxcars. This point of view is reiterated without additional support by the Chicago and North Western Transportation Company. As we have previously explained, a major goal of the exemption is the competitive revitalization of boxcar service. This goal requires freedom from regulation for the entire field of service. It cannot be accomplished within a reasonable period of time by piecemeal commodity-by-commodity exemptions.

Canadian carriers[21] assert that the exemption will be incompatible with the Canadian scheme of regulation, which requires tariff filings but does

[18] Public. Law 97-468, 96 Stat. 2577, section 608(a)(2).

[19] Published July 21, 1983, at 48 F.R. 33229.

[20] It is clear for another reason that the Commission has the authority to relieve ARR from the requirements of the Interstate Commerce Act which were made applicable by Executive order. Section 3 of the order specifically subjects ARR to subchapter I of chapter 105 which includes the exemption authority (49 U.S.C. 10505).

[21] The Canadian National Railway Company and Canadian Pacific Limited.

not regulate rate levels. Their specific complaints about the exemption are no different from those made by domestic carriers and have no special bearing on cross-border movements. We have retained jurisdiction over matters of car supply and mandatory interchange. The exemption does not relieve carriers of an obligation to provide contractual terms for loss and damage liability. Although tariffs will be required by the Canadian government and not by us, the two systems are merely different, not incompatible. Carriers should have no difficulty conforming to the applicable regulatory scheme of either country. They do this now in transporting other commodities that we have exempted. We note that the Canadian government itself has not objected to the exemption.

Finally, a few of the pleadings repeat earlier assertions that the exemption will lead large carriers to eliminate joint rates, to the detriment of small carriers. We considered this argument at length in *Boxcars*[22] and concluded that it was without foundation. We observed that joint rates can generally be eliminated even under regulation, particularly on unprofitable traffic,[23] although litigation can make the process unnecessarily expensive and time consuming. Through traffic can continue to be handled even in the absence of joint rates. Most importantly, we saw no reason to expect major carriers to disrupt the movement of profitable traffic originated by small carriers, for they, too, benefit from the revenue earned on this traffic. Thus, where joint rates enhance the attractiveness of through rail service, we expect that they will continue to be offered even in the absence of regulation. Nothing said in the petitions leads us to doubt the correctness of these observations.

Several class III carriers have argued that the exemption is inconsistent with specific protections for class III carriers contained in 49 U.S.C. 10705a. In the absence of our use of the exemption power provided by 49 U.S.C. 10505, section 10705a would indeed place certain limits on the ability of carriers to impose surcharges or cancel joint rates. However, we believe that an exemption from section 10705a (along with other ratemaking provisions of chapter 107) would further the rail transportation policy of section 10101a without leading to abuse of market power.

The rail transportation policy of section 10101a strongly favors competitive ratemaking where competition is possible. As explained in our prior decision, boxcar traffic is especially subject to diversion to other

[22] 367 I.C.C. at 443-44.

[23] Joint rate surcharges and cancellations on traffic that makes little or no contribution above variable cost are readily permitted under 49 U.S.C. 10705a. Other joint rate cancellations are governed by the public interest standard of 49 U.S.C. 10705(e). The Commission has indicated that this provision is not to be considered in a vacuum. It should be applied consistently with the overall policy of the Staggers Rail Act that the Commission intervene only when there are inadequate economic restraints on railroad market power. See Ex Parte No. 445, *Standards for Intermodal Rail Competition*, notice of denial of petition for rulemaking served July 7, 1983 (published July 11, 1983, at 48 F.R. 31672).

modes and consequently will not bear excessive rate increases. What matters to the shipper is the origin-to-destination rate, not the size of the connecting railroad of origin or destination. In other words, after excessive rate increases on boxcar traffic, diversion would take place regardless of whether the traffic moved jointly with a class III railroad or moved solely on a class I railroad. This gives long haul class I railroads an incentive to hold down rates that they would charge for transportation to junctions with class III carriers in the absence of joint (single factor) rates for the origin-to-destination movements. In fact, if the boxcar exemption experience even partially duplicates our experience with deregulation of TOFC/COFC service, traffic will be attracted back to boxcars, and some of the added traffic is bound to move over class III carriers.

Of course, if a joint movement of boxcar traffic with a class III carrier were inherently inefficient or unprofitable, then the larger carrier could be expected to use the exemption to remedy the situation rather than to tolerate an indefinite cross subsidy of the joint movement at the expense of other traffic or its ability to earn adequate revenues. This, however, would be entirely consistent with the rail transportation policy and with the policies of other sections of our governing statute.[24] Carriers cannot afford the luxury of preserving inefficient routes when competitive pressures force them to reduce costs as much as possible.[25] The very purpose of a section 10505 exemption is to eliminate unnecessary regulatory restraints on price and service changes which may be found in our governing statute. Given the pervasive competition for boxcar traffic, the rail transportaion policy of section 10101a does not require retention of restrictions on ratemaking for through boxcar service involving class III carriers.

As already noted, we expect no loss of service on efficient routes.

No new arguments were raised in the petitions concerning other aspects of the freight rate exemption. Thus, we reaffirm our previous conclusions on this subject without further discussion.

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[24] See, *e.g.*, 49 U.S.C. 10101a(10) and 10707a(e)(2)(C), both of which favor the elimination of noncompensatory rates.

[25] The Commission has clearly stated that it does not favor rate equalization between efficient and inefficient routes, as follows:

> Nor do we think it would be in the public interest for carriers to attempt to maintain equalized rates over competing joint routes. Obviously, some of the many routes between two points will be much more costly than others. If railroads are to compete effectively with other modes, a more efficient route must be permitted to carry a lower rate. It should not be priced at the same level as other joint rates between the points involved. The railroads, faced with a declining market share, must be free to make rate adjustments necessary to attract or retain traffic.

Traffic Protective Conditions, 366 I.C.C. 112 at p. 122 (1982). See also *Guilford Transp. Industries, Inc.—Control—D&H Ry. Co.*, 366 I.C.C. 396, 408-09 (1982).

III. THE CAR HIRE EXEMPTION

A. *Background.*—Car hire regulation, like freight rate regulation, has been an obstacle to pricing flexibility and cost reduction in boxcar service. The rentals railroads pay for use of one another's cars are based on a formula prescribed by the Commission.[26] Each day that a car is on the lines of another carrier, the car's owner collects the prescribed rental charge, not only while the car is loaded, but even after it is unloaded, regardless of whether the car stands idle on the other carrier's lines, is reloaded for return movement, or returns empty.

A phenomenon caused by this system especially during periods of low traffic movement, such as the present, is the unnecessary cross hauling of empty cars. A carrier with a shipment to load for transport to a destination on another carrier's lines, and with an empty car of that carrier available, generally returns that carrier's car empty and loads the shipment in its own car. When the shipment is delivered and the other carrier has a shipment to load in the reverse direction, it too returns the available car empty, and loads the shipment in its own car. Under the present rules, each carrier often finds that it is a net benefit to load its own car and collect car hire from the other carrier, rather than to load the other carrier's returning car and collect only its share of the freight revenue.[27] Obviously, this unnecessary hauling of empty cars inflates each carrier's operating costs compared to costs that would be incurred in loading the returning foreign car and avoiding unnecessary movement of the orig-

[26]The formula distributes the annual car ownership costs, including return on capital investment, over the number of days that a car is "active" (i.e., not stored on the owner's lines). Given the purchase price and age of a car, this formula produces the daily and per-mile rental charge that the car is entitled to earn. See *Car Service Compensation—Basic Per Diem Charges*, 358 I.C.C. 715 (1977) and 362 I.C.C. 884 (1980).

[27]In each case the carrier must compare the following costs and benefits:

Using a system car	*Using a foreign car*
1. Car-hire cost of foreign car returned empty to gateway	Car-hire cost on foreign car returned loaded to gateway
2. Operating cost of moving foreign car empty to gateway	Operating cost of moving foreign car loaded to gateway
3. Operating cost of repositioning system car for loading	Operating cost of repositioning foreign car for loading
4.	Car-hire cost of holding and repositioning foreign car for loading
5. Operating cost of moving system car loaded to gateway	
6. Car hire revenue earned by system car while off line	

(footnote continued on next page)

inating carrier's car. The receiving carrier is unable to discourage this inefficient loading pattern, since it is required to accept the other carrier's loaded car and pay the prescribed rental rate.

Another defect of prescribed car hire is that it creates at least the illusion of a guaranteed return on investment, encouraging investors to acquire cars without regard to the adequacy of the existing car fleet. Because prescribed car hire provides earnings proportional to a car's purchase price, it also encourages the acquisition of expensive cars, even though their higher rental costs must ultimately be passed on to shippers, making boxcar service less competitive with truck transportation.

Finally, because a carrier that loads a shipment in its own car can always earn the prescribed rental rate, it seldom charges less, even though our regulations permit it to do so.[28] Thus, most car rental rates do not fall when the demand for cars is weak.[29] This unresponsiveness of prescribed car hire to market conditions discourages freight rate reductions that might attract additional traffic.

(footnote 27 continued)

Under the present system, the originating carrier disregards the costs and benefits that his decision creates for the delivering carrier, which are as follows:

	Using originating carrier's (o.c.) cars	*Using delivering carrier's (d.c.) car*
1.	Operating cost of moving o.c. car loaded from gateway to destination	Operating cost of moving d.c. car loaded from gateway to destination
2.	Operating cost of moving o.c. car empty from destination to gateway (if no return load available)	
3.	Car-hire cost on o.c. car moving loaded from gateway to destination	
4.	Car-hire cost on o.c. car moving empty from destination to gateway (if no return load available)	
5.	Car hire earnings on d.c. car moving empty to gateway	Car hire earnings on d.c. car moving loaded from origin to gateway
6.		Car hire earnings on d.c. car being held and repositioned for loading.

The car hire exemption's effect on the loading carrier's incentive to use its own car is discussed in part III.E. of this decision.

[28] *Flexibility in Setting Railroad's Per Diem Levels*, 364 I.C.C. 107 and 291 (1980).

[29] Indeed, the prescribed car hire level rises when demand is weak because car ownership costs are distributed over fewer active car days under the car hire formula. Because of this and other aspects of the formula, the AAR has alleged that the prescribed car hire level would have jumped by 25 percent in 1983. Recognizing the inappropriateness of this increase under current economic conditions, the Association of American Railroads and The American Short Line Railroad Association petitioned us for (footnote continued on next page)

B. *Nature of exemption.*—Conrail initially proposed a full exemption of car hire from regulation. Most parties to the proceeding objected because they felt that prescribed car hire was needed to ensure order and coordination among railroads in the use of the boxcar fleet. In response, Conrail submitted a modified proposal which retains the prescription of car hire rates but encourages voluntary agreements between carriers to reduce car compensation and car handling costs when traffic levels are low, and enables receiving carriers to reduce car rental costs on idle cars even in the absence of agreements. We adopted Conrail's modified proposal. The conditioned exemption is a useful step toward greater responsiveness of car rental rates to market conditions. At the same time, because it does not completely abandon the established car hire system, it lends itself to prompt implementation.[30]

Under the adopted proposal, carriers have the option of reaching bilateral agreements on car compensation to apply in lieu of prescribed car hire. These agreements can embrace all matters that the parties regard as pertinent, including car reloading practices and freight rate reductions. Where agreements are not reached, carriers will be allowed (but not required) to charge car owners as much as 35 cents per mile for returning empty cars when ordered to do so. Carriers may also reclaim (cancel) car hire payments on cars stored empty on their lines for more than 3 days.

Our action exempts carriers from 49 U.S.C. 11122 to the extent that they do not have to observe the car hire rates we prescribe. In the present decision, we shall refer to this action, for convenience, as the "car-hire exemption."[31] Certain details of this exemption have been misunderstood by some parties. For clarification, we will state that, in the absence of a contrary agreement by the parties, the prescribed car hire rates continue to appy to empty movements, whether or not empty return charges are imposed by the carriers handling the car. In addition, cars stored off line are subject only to a reclaim or cancellation of the applicable car hire for the storage period, not to the imposition of other storage charges.

(footnote 29 continued)

a postponement of the updating of the car hire level. We granted a postponement pending receipt of comments in Ex Parte No. 334, *Car Service Compensation—Basic Per Diem Charges* (not printed), served March 30, 1983. Notwithstanding the counterproductive impacts that this car hire increase could have had on freight rates, the postponement was challenged by Itel Corporation, a firm that leases boxcars to short line railroads in exchange for car hire revenue. (Per diem leases are discussed in part III.I. of this decision.) Itel's petition to stay the postponement pending judicial review and to proceed with updating of the car hire level was denied by our decision served June 23, 1983 (not printed).

[30]The Commission did not reject in principle the notion of complete deregulation of car hire. A proceeding inviting comment on that and other car compensation options for all types of freight cars will be instituted soon, as Ex Parte No. 334 (Sub-No. 6), *Review of the Car Hire Compensation System.*

[31]More precisely, our action constitutes a partial exemption from regulation subject to conditions, as discussed in part III.C. of this decision.

C. *Lawfulness of exemption under 49 U.S.C. 10505(a).*—In adopting the modified Conrail proposal, we acted under 49 U.S.C. 10505(a). That section authorizes us to grant exemptions from provisions of 49 U.S.C. Subtitle IV when we find that continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a or to protect shippers from abuse of market power.

Certain parties contended that the proposal would result in inadequate compensation to car owners, choking off new investment and reducing the availability of boxcars. They asserted that these consequences would be contrary to requirements of the rail transportation policy to ensure the development and continuation of sound rail transportation (section 10101a(4)), to foster sound economic conditions in transportation (section 10101a(5)), and to promote an efficient rail transportation system (section 10101a(3)).[32] We recognized that permitting supply and demand to influence car compensation would result in some financial burdens on suppliers when supply greatly exceeds demand (conversely, potential financial benefits when demand exceeds supply), but we concluded that any adverse effects would be limited in extent and duration especially if bilateral agreements or contracts were entered by parties, that any needed new investment would still be made, and that any disruptions in car supply would be accommodated as car owners and users adapt to the new system.[33] Further allegations of prospective harm to car owners are made in the petitions for reconsideration. For reasons that we will discuss in this decision, we reaffirm our finding that any adverse effects of the exemption on the rail transportation system will be of limited extent and duration. As we previously found, these effects are outweighed by numerous positive consequences under the rail transportation policy.[34]

We also found that denial of the exemption was not necessary to protect shippers from abuse of railroad market power. We noted that the car compensation proposal related only to transactions between carriers[35] and that we did not expect serious or long-term service disruptions that would adversely affect shippers.[36] The petition for reconsideration of

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[32] *Boxcars* at p. 449.

[33] *Boxcars* at pp. 452-4.

[34] We found that the exemption will positively serve the rail transportation policy by allowing competition and demand to establish car compensation (section 10101a(1)), promoting efficiency in car use (section 10101a(3)), fostering sound economic conditions in transportation by allowing car compensation to fluctuate with market conditions (section 10101a(5)), promoting reasonable rates for boxcar service (section 10101a(6)), promoting individual rail responses to market conditions in place of collective responses (section 10101a(11)), and promoting energy conservation through reductions in empty car-miles (section 10101a(15)). *Boxcars* at p. 455.

[35] *Boxcars* at p. 450.

[36] *Boxcars* at p. 454.

Brae Corporation (Brae) emphasizes that class III railroads may be owned by shippers. It argues that class III railroads will be harmed by the order from the exercise of major railroads' market power and that this harm will be transmitted to the shippers that own the railroads. We reject this argument because, as we shall discuss further below, we do not believe that major railroads will have any reason to undermine the health of class III railroads through actions taken under the exemption.

Our decision affecting car compensation, as we previously stated, is a partial exemption from regulation subject to conditions.[37] To explain that characterization more fully, it is an exemption because it allows carriers to take actions that are inconsistent with the terms of compensation that we prescribe for freight car use under 49 U.S.C. 11122.[38] The exemption is partial because it allows only specified types of departures from the prescribed terms.[39] The exemption is subject to conditions in that carriers may not exceed certain limits in exercising it.[40]

D. *Lawfulness of exemption under 49 U.S.C. 11122.*—In our decision, we invoked 49 U.S.C. 11122 as well as section 10505 as authority for approving Conrail's modified proposal,[41] although we had not cited section 11122 in our notices of proposed rulemaking. Opponents of the proposal, and even some supporters, have questioned the legality of adopting regulations under a statutory provision without previous public notice that action under that provision was contemplated.

We agree that the procedure followed may raise substantial legal questions. Therefore, we withdraw any reliance on section 11122 as authority for approval of the proposal.

An issue raised by some exemption opponents[42] is whether the car hire exemption is *prohibited* by section 11122. The essence of their argument is that although the Commission may not be required to prescribe car hire under section 11122, if it does, it must prescribe a compensation level that is calculated to include a fair return on capital investment. By allowing empty return charges and car hire reclaims, they argue, the Commission exercises its discretionary authority and thus comply with

[37] *Boxcars* at p. 456.

[38] That is, car users may impose empty return charges and cease payment of car hire on stored cars. Car users and owners may depart from prescribed car hire in other ways if they make bilateral agreements.

[39] Authority to grant a partial exemption is clearly implied by the authority in section 10505(d) to partially revoke an exemption. Moreover, the Conference Committee report on the Staggers Act states the expectation that "The Commission will pursue partial and complete exemptions from remaining regulation." H.R. Rept. 1430, 96th Cong., 2d. sess. 117 (1980).

[40] That is, return charges are subject to a stated ceiling, and stored cars are subject only to car hire reclaims and only after 3 days.

[41] *Boxcars* at p. 456.

[42] Brae and the Railway Progress Institute.

section 11122. They conclude that any Commission action that undercuts car owners' ability to earn a fair return is unlawful.

We cannot agree in conditioning the exercise of this exemption we must follow the requirements of section 11122.[43] Indeed, we have the power under section 10505 to exempt car compensation from regulation altogether. We are retaining the prescription of car hire rate at present to provide an orderly framework within which car owners and users can begin to take significant steps toward their own solutions to the problems to recovering car investment costs and pricing boxcar service efficiently. We reject any suggestion that we must either exempt car hire altogether or else adhere strictly to a relatively inflexible system of prescribed car hire that diminishes market influences. Congress surely did not intend to create a legal framework in which reasonable intermediate phases are forbidden.

Even if the Commission were required to apply the section 11122 standards to the retained prescriptions, our action is consistent with the statute. Section 11122 explicitly recognizes that variables outside of investment costs must be included in he car hire compensation formula. "In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national car supply." 49 U.S.C. 11122(b). Thus, 11122 contemplates that the rate of compensation must include a component which reflects market demand or use and supply. What the Commission does by its exemption decision is to accord the "market" components greater weight.

Also implicit in the opponents arguments is the suggestion that the Commission has guaranteed a level of compensation for investments in freight cars. To be sure, in 1970 at a time of shortage, the Commission established high rates of compensation (incentive per diem) on boxcars to encourage additional investment. *Incentive Per diem Charges—1968*, 337 I.C.C. 217 (1970). Then, in 1976 Congress enacted legislation which allowed (rather than required) the Commission to prescribe "incentive" rates on all freight cars. Section 212(a), Railroad Revitalization and Regulatory Reform Act of 1976. (4R Act), Public Law 94-210 (1976). However, in 1980 both Congress and the Commission eliminated the incentive element from consideration in setting car hire charges. See our prior decisions, 367 I.C.C at p. 453.These actions should have put inves-

[43] Although we do not rely on the authority of section 11122, we have, as a general matter, considered its policies. Under the exemption, carriers will be encouraged to acquire boxcars which are needed by shippers and to use them efficiently. In fact, the exemption is more likely to achieve these goals than adherence to the existiing system.

tors on notice that the regulatory enviornment was in transition and that car hire charges and the concomitant return on investment would be in the future to a much greater extent subject to market forces.[44] It should now be clear, 3 years later, that the Commission will no longer give boxcar investors any semblance of a future guarantee concerning car compensation or the return on their investment. That return must be dictated by forces of supply and demand. To do otherwise, as some of the exemption opponents argue, would be counterproductive, reducing efficiency, competitiveness and profitability of boxcar service, and it is contrary to the goals of the rail transportation policy enacted by Congress as 49 U.S.C. 10101a. Therefore, while we do not believe our exemption of boxcars to be inconsistent with section 11122, we nonetheless exempt boxcar compensation from the requirements of that section.

E. *Incentive effects of exemption.*—One of the reasons we approved the car hire exemption was to stimulate carriers to reduce unnecessary empty car movements. Certain opponents of the exemption contend that the actions we authorized, particularly the imposition of empty return charges, will not induce more efficient loading practices.

The Illinois Central Gulf Railroad Company (ICG) argues that the empty return charges will not bring about more efficient car use and in fact will provide an added incentive for carriers to load their own cars and return foreign cars empty. Although it implies that the charges will be counterproductive in all circumstances, it relies on a study which focused only on instances where the length of haul by the originating carrier comprises more than half the total movement.[45] This selectivity leads to a biased analysis.

The ratio of the length of the originating carrier's on-line haul to the length of the off-line haul is important because a carrier loading its own car in preference to a foreign car could collect as well as pay empty return charges (assuming that both it and the other car's owner request the return of idle empty cars).[46] It would collect charges for returning the

[44] Most car investors will earn a profitable return on their investments under market-determined car hire rates. They will not be able to recover a pro rata share of investment costs when traffic levels are down, but they should do very well when demand for cars is strong. Indeed, a free market promotes the earning of a fair return on investment by encouraging new investment only at times when expected future demand is sufficient to give reasonable assurance that the investment will be profitable. In the case of exempt boxcar service, we have decided that profits on car investments should be earned by sound car investment decisions and efficient car management practices, and not guaranteed by the Government.

[45] Verified statement of Veena R. Mendiratta, included in the joint supplemental comments of the Chicago and North Western Transportation Company, et al.

[46] Requests for car returns are made under AAR car service rules. AAR has developed modifications of these rules to accommodate the car hire exemption. Its request for Commission approval of these modifications will be ruled upon in a separate decision.

foreign car empty over its own line and pay to have its own car returned by other carriers. In the instances cited by ICG, the originating carrier would collect more empty return revenue than it would pay, because its own haul is longer. On the other hand, every routing that fits this description has a counterpart routing in the opposite direction where the originating carrier's own length of haul is shorter than the length of the off-line haul, and where the originating carrier would pay more in empty return charges than it would collect. For the latter carrier, the empty return charges would reduce the advantage of loading its own car when a returning foreign car is available.[47] Empty mileage charges provide an incentive for sending foreign cars home loaded.

Reducing the incentive for inefficient loading[48] in the direction in which the originating carrier has less than one half the total distance will reduce the opportunity for inefficient loading in the opposite direction. As noted, empty return charges will reduce the incentive for the carrier with the shorter haul to send its own cars out into the system unnecessarily.[49] As a result, the supply of empty foreign cars fromthe carrier having the shorter haul will be reduced. The carrier with the longer haul will be more likely to receive incoming loads in its own cars and therefore have less opportunity to return foreign cars empty.

ICG's analysis is misleading in another respect. It considers only car hire revenue and empty return charges, creating the impression that empty return charges must be greater than car hire revenue to take the profit out of a carrier's unnecessarily loading its own car. In reality, there are additional factors, such as the transportation cost of moving an empty foreign car and of repositioning an empty system car prior to loading that help to offset the factors inducing the carrier to load system cars. Receiving carriers can also offer freight rate adjustments in combination with the provisions of the car hire exemption to discourage unnecessary empty car movements.

[47] As an example, one of the movements used in ICG's presentation was from Seattle to Cleveland via the Union Pacific, ICG, and Conrail. Union Pacific, if it loaded its system car, could pay up to $290 in empty return charges on the system car, but would collect $376 in car hire revenue and up to $630 in empty return charges on the foreign car, for a net benefit of $716. If the reverse movement is considered, Conrail in loading its own car would pay a maximum of $800 in empty return charges, while it would collect $706 in car hire and at most only $119 in empty return charges on the foreign car, for a net benefit of only $25. This amount could easily be offset by Conrail's extra operating cost in handling two cars instead of one as well as the cost of extra wear on its car.

[48] By "inefficient loading," we mean an originating carrier's loading of a shipment to be interlined in its own car while returning an available foreign car empty.

[49] The carrier would still have economic incentives to use its own cars in instances where it has agreements with connecting carriers to reload its cars, perhaps based on reduced car hire. Since these cars will be reloaded, their use creates no inefficiency.

We would emphasize that the imposition of empty return charges is intended, not as the main tool of the exemption, but only as a last resort when carriers do not reach agreements that otherwise reduce inefficient loading. Conrail indicates that it has already begun to negotiate bilateral agreements with other carriers in anticipation of the exemption's becoming effective. Under all of the agreements Conrail has made thus far with the benefit of the exemption, empty movements will be reduced without the imposition of empty return charges.

Some short-line railroads contend that the exemption would serve no useful purpose applied to their cars because these carriers originate many more shipments than they terminate and therefore they have few foreign cars terminating on their lines to reload. This argument overlooks returning foreign cars that are likely to be available from the nearest main line carrier. Empty returns of these foreign cars by the main-line road could be avoided to the extent that the short lines would load them.[50] In some cases, short lines have signed agreements with car lessors that prevent them from loading foreign cars as long as leased cars are available. Provisions of this type are an obstacle to efficient use of the national boxcar fleet. The exemption should tend to discourage these arrangements in the future. When short-line railroads load their own cars to destinations where few outbound shipments are available, they impose a burden on the receiving carrier to return their empty equipment. If the short lines cannot or will not load returning foreign cars instead of their own cars which would then be returned empty, at least they should pay for the empty returns that their practices necessitate. In this way, their traffic will be prevented from imposing more of a cost burden on delivering roads than the traffic of carriers that do cooperate in minimizing empty equipment movements.

Short lines and lessors that desire reloading of their own returning cars fear that the exemption will create a preference for reloading of class I carriers' cars. There are two possible reasons why this might occur.

Class I carriers may charge less for empty returns to other class I railroads, so the higher empty return charge on class III equipment would be an inducement to the class I carrier to return it empty and load the class I cars. But if class I carriers impose lower empty return charges on

[50] Under 49 C.F.R. 1033.15, the loading short-line carrier can order cars from the designated road haul carrier. Under the present car hire system, the road haul carrier would ordinarily supply its own car. With the incentives created by the car hire exemption, however, it should be willing to provide returning foreign cars to avoid having its own cars traveling to off-line destinations unnecessarily. Agreements between the short-line and the road haul carrier, between the short line and the shipper, and possibly between the short line and car leasing companies seeking return loads for their cars, would all facilitate the short line's use of returning empty cars obtained from the road haul carrier. All would benefit from this more efficient approach to car use.

other class I carriers' cars, it would only be because they receive similar concessions from the other carriers. In that case, the class I's are compensating each other for empty returns by providing service. The class III railroad, which provides few such services and is not burdened with hauling and incurring an operating cost for long empty returns, should not expect to receive the same concessions. On the other hand, if it were to make concessions of equal magnitude in other areas, such as the car hire rate, it might obtain agreements that put its cars on the same footing as class I carriers. If the short line agreed to measures that directly minimize empty car movements, it might even avoid the imposition of empty return charges altogether.[51]

The other reason that class III cars may not be return-loaded as often as class I cars is that they may be newer, more expensive cars carrying higher car hire rates, so that other carriers want to get them off their lines at quickly as possible. Under our car hire formula, the owners may charge higher car hire rates for these cars, but in doing so they make them less attractive to carriers whose loading needs can be met by less expensive cars. In this case, if the car owner offered a partial car hire reclaim on its reloaded cars to bring their rental cost more into line with their value to the using carrier, the car owner could expect to have more of its cars reloaded.

F. *Requests for exclusions.*—A number of requests have been made to exclude various categories of boxcars from the car hire exemption. Generally these requests were made because of fears about the financial effects of the exemption on the owner of the cars.[52] The proponents of these various exclusions, however, give little attention to their effects on the efficacy of the exemption. We conclude that in every case the effects would be unacceptable and that none of the exclusions is warranted.

Certain lumber shippers seek a declaration that type LU "all door" boxcars are not included in the exemption, but they give no reason why these cars should be treated differently from other boxcars, and we are aware of none. The exemption applies to all boxcars, regardless of type.

Exclusions for the cars of small carriers are proposed in various forms. Brae Corporation, a major lessor of cars to small railroads, urges an exclusion for cars acquired by class III railroads by purchase or lease of at least 10 years' duration primarily for use by shippers on their own lines. Many objections to this proposal were made by carriers that regard it as discriminatory. These parties also question how it could be determined that a car was acquired primarily for use by shippers on a carrier's own

[51] Short lines and their interline partners could mutually agree to reload each other's returning cars as a means of avoiding a resort to empty return charges.

[52] We will deal with the question of financial effects later in this decision.

lines. Since Brae's cars are leased in exchange for revenue earned off line, there could be some question whether these cars even meet that description. Some other small carriers support the idea of an exclusion, but feel that it should be broadened to embrace cars leased for less than 10 years, cars acquired for use by shipper on- or off-line, and cars of class II carriers. DOT suggests an investigation of a possible exclusion for class III cars acquired to serve a *single* shipper. It is apparent, however, that such a narrow exclusion would satisfy few of those objecting to the exemption. Moreover, DOT does not explain why the described category of cars should be treated differently from others.

Excluding any category of boxcar permanently from the exemption on the basis of ownership would have undesirable consequences. Once boxcars are made eligible for the imposition of empty return charges, the same exposure should apply to all boxcars or there would be some economic advantage or disadvantage for those that are shielded. A carrier given the choice of reloading one of two returning foreign cars would be likely to load the one on which it is prevented from collecting empty return charges. The costs of returning class III cars are no less than the costs of returning cars owned by other carriers, and there is no reason why we should create a system that is skewed.

Carrying the exclusion approach to its extreme, there are those that say the car hire exemption should not apply to *any* existing boxcars. They argue that past investments were made in reliance on the regulated car hire system, and that owners of existing cars are, or should be, guaranteed a continuation of that system.

We do not find this argument convincing. Section 11122 certainly provides no guarantee that the Commission will never change its approach to car compensation. Indeed, there is no *requirement* in section 11122 that the Commission even prescribe car hire. In any event, the power to grant exemptions extends to all sections of Subtitle IV, including section 11122, and Congress has encouraged the Commission to move toward more market-oriented approaches to car compensation.[53] The Commission's dissatisfaction with the present system and its desire to find alternatives have long been a matter of public knowledge.[54]

Obviously, excluding all existing cars would totally undermine the exemption. The most important point brought out by the decision is that all carriers must recognize the need to negotiate car hire practices. The large boxcar fleet that now exists could be kept in service far beyond its

[53]"* * *[T]he Commission shall continue to examine means (such as flexible car hire) of making basic car hire more responsive to market forces * * *" H.R. Rept. 1430, 96th Cong., 2d sess. 117 (1980).

[54]See, *e.g.*, Ex Parte No. 334 (Sub-No. 5), *Zone of Reasonableness for Car Hire Charges*, notice of proposed rulemaking published November 5, 1980 (45 F.R. 73524).

expected life, in preference to new car investment, if it enjoyed favored regulatory status. The efficiency problems that have caused us so much concern in this proceeding would be perpetuated for years, if not decades. In the long run, unequal treatment of new cars would not only discourage investment but would also produce a fleet that was part regulated and part exempt, complicating both car service and car hire. Clearly, any car hire reform that cannot be applied to existing cars is no reform at all.

In sum, this is a situation where equality of treatment is necessary. There is no reason to encourage a class III railroad to pursue policies which create wasteful empty mileage than there is to allow a major railroad to do so. The current regulations creating inefficiency in the rail network increase the underlying cost of rail carriage and thereby harm shippers and consumers. They are equally harmful regardless of which railroad makes use of them.

G. *Bargaining strength.*—Many who oppose the exemption claim that regulation is needed to protect small carriers from larger carriers because the former would have no leverage in a free market for bargaining with the latter. This argument misconceives both the role of regulation and the nature of bargaining.

In the first place, our decision does not create a totally free market in car hire. Carriers would still be required to accept each others loaded cars. The exemption would not totally repeal prescribed car hire charges. Our decision merely allows destination carriers to recover the expense that they must bear when origin carriers force them to return their cars empty. This does not create an inequality of bargaining power between large and small carriers—it partially *withdraws* a severe inequality created by current regulation in favor of origin carriers.

Under current law, it is not the Commission's role to lock any carrier into unprofitable service obligations, nor to restrict carriers' ratemaking freedom in competitive markets.[55] Small carriers continue to operate today, and increase in number. Large carriers have no incentive to drive them out of business. This exemption will not create that incentive either. The short lines are secure in their markets as long as they continue to provide needed services and generate valuable traffic.

Contrary to the suggestions of some, size does not always dictate bargaining strength. Large size brings with it large capital costs, which can become a crushing burden when plant capacity is idle. Under those conditions, a large carrier is far from being able to name its own terms. It has no choice but to accept traffic available on terms that cover short run marginal costs and make at least some contribution to overhead.

[55]See the discussion concerning joint rates in part II.B of this decision.

A small carrier can always insist on enough revenue to cover its own marginal costs, because it cannot rationally undertake to provide service for less. The penalty for a large connecting carrier that fails to allow the small feeder carrier to earn its required revenue is loss of traffic and loss of a contribution toward its own capital costs. To this extent, the small carrier's bargaining strength is absolute.

Bilateral agreements under the car hire exemption are not intended to allow car owners to avoid paying for empty returns by exerting economic power. Rather, the bargaining process allows interline partners to improve on the rigidity of prescribed car hire, empty return charges, and storage reclaims. The carriers can negotiate terms that maximize their efficiency incentives and minimize their costs. The bargaining process gives the short-line carrier an opportunity to make its own cost constraints known so that freight rates as well as car related charges can be adjusted to preserve traffic movement.

H. *Financial effects on car-owning carriers.*—As already noted, most of the arguments against the car hire exemption are premised on the view that the exemption will result in severe financial losses for those that now collect car hire payments. This view has been expressed in requests for reconsideration of the exemption filed by a few major railroads, several car lessors, a large number of short-line railroads, and several shippers that own short-line railroads. Of the short lines that sought reconsideration, it appears that about half are owned by shippers[56] and half are independent. Petitioning carriers in each of these categories seem to be equally divided between those that acquire cars through purchase or fixed-payment lease and those that have "per diem leases" under which car hire revenue collected by the lessee carrier is passed through to the lessor. Whether a carrier is owned independently or affiliated with a shipper should not change how it is affected by the car hire exemption. However, the manner of car acquisition creates differing conditions deserving separate analysis. We will consider first the effect of the exemption on carriers that own their cars or acquire them by fixed-payment lease. This category includes most major railroads as well as many short lines.

Some assert that the car hire exemption, and particularly the empty return charges, will result in vast transfers of revenue from car owners that originate traffic to delivering carriers. We are confident that this will not occur.

First, a car owner requesting return of an empty car will continue to earn car hire for the return trip. Although other carriers could impose a mileage charge for returning the empty cars, they would not be relieved

[56] Several of the shipper owned lines provide service for other shippers besides their affiliates. Brae estimates that 16 percent of all class III railroads are shipper owned.

of the obligation to pay car hire while the car is moving over their lines.[57] Once this assumption is corrected in the carriers' examples, the revenue reduction would be substantially less.

Of greater importance is the failure to attempt a realistic portrayal of the freight rate adjustments that could be expected if an empty return charge were imposed. Of necessity, the origin carrier and the destination carrier are partners in selling boxcar service to the shipper. The total of the revenue collected from the shipper by both carriers will be no greater than the shipper is willing to pay, given the shipper's own marketing constraints and transportation alternatives, or else the shipper will simply not purchase boxcar service and both carriers will lose business. Where freight rates are already at a maximum competitive level, it is clear that any increase in rates by one carrier must be accompanied by a reduction by its interline partner, or the business will not accrue to both carriers.

Short lines that say an empty return charge would put them out of business imply that they cannot afford to absorb this increased cost and that they would have no way to recoup it. In fact, however, they can recover any nonabsorbable cost by increasing their freight rate. The destination carrier will be faced with the reality that the originating carrier must increase its freight rate to stay in business, that the shipper will not pay a higher total freight rate, and that the destination carrier must therefore make an offsetting reduction in its own freight rate to preserve the business. Because the destination carrier will now be receiving revenue for empty returns from the origin carrier, it will require less revenue from the shipper, and can therefore afford to reduce its freight rate. It clearly will do so if the alternative is to lose profitable business. Consequently, there is no reason to suppose that the short line will go out of business or that the shipper will lose service.[58]

Thus, even if the empty return charges brought about no improvement in efficiency, they should have little, if any, adverse effect on car owning railroads. Our intention, of course, is that efficient loadings will increase. To the extent that they do, both interline partners will be freed of the operating costs imposed by unnecessary empty car movements. They will then have additional profit to divide between them or share

[57] In one case, where a petitioner (National Railway Utilization Corporation) claimed that the empty return charge would exceed its car hire earnings, the petitioner understated the car hire earnings in its "before" example, by basing them on one-way mileage over the delivering carrier's line instead of round trip mileage, and then compounded this error by halving this figure in its "after" example on the assumption that a returning empty car would not earn car hire. If these errors are corrected, it is clear that the empty return charge would not exceed the origin carrier's car hire earnings.

[58] Stated somewhat more emphatically, if two carriers are jointly providing a profitable service, one will not make it financially impossible for the other to continue. They are like two climbers linked by a rope: one simply does not push the other over a cliff.

with the shipper. If this cost reduction enables them to achieve even a slight reduction in their freight rates, they may improve their competitive posture.[59]

There are certain situations in which this analysis might appear not to be applicable. These might occur where the empty return charge follows an outbound movement on which the car owner does not collect freight revenue. One example is where the owner's car is loaded by another carrier at an off-line point to a destination farther distant from the owner's line.[60] Another is where the owner acts merely as a switching carrier in loading a shipment that is routed over another carrier for the outbound line-haul movement.

We consider it appropriate for the owner to pay for the return of its car even in these instances. The owner, after all, collects car hire the entire time the car is occupied with, or returning from delivery of, the outbound shipment. If the owner is unwilling to allow the use of its car for the amount of the net compensation it would receive, it can condition the loading of its car by another carrier on the existence of a bilateral agreement in which its empty return expense is covered by that carrier. This condition could be announced through the same channels as other restrictions now imposed by car owners, such as those concerning acceptable types of lading.

Several parties have contended that the car service exemption results in a deprivation of property without just compensation. This is incorrect; the exemption does not require that the cars be made available for a public use without payment but merely subjects car compensation to the forces of supply and demand. As explained elsewhere, there was the semblance of a guaranteed return on investment for boxcar owners under the system before exemption because per diem was prescribed and interchange mandatory. (Thus terminating carriers had no alternative but to accept all cars tendered even if the per diem payments and car handling costs would wipe out all freight revenues.) Here, on the other hand, there are means by which originating carriers can protect their investment, for example, by withdrawing their cars from unlimited service or increasing their portion of the freight rate.

In any event these investors do not have a constitutional right to a regulatory guarantee that they will receive a particular return. Indeed, such a guarantee would not be consistent with the mandate of the rail transpor-

[59] In the long run, more efficient car use can also enable the carrier to handle more traffic with a given level of investment in equipment, thereby lowering its unit costs of service and permitting a further reduction in freight rates.

[60] This may not be possible under the car service rules administered by the Association of American Railroads. The boxcar exemption creates no change in those rules except as may be necessary to accommodate storage reclaims, empty return charges, and bilateral agreements.

tation policy, 49 U.S.C. 10101a(1), "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." Every exemption necessarily affects the fortunes of those businesses which were benefitted by regulation. Nevertheless, that does not preclude the agency from granting an exemption where, as here, regulation is not needed to further the rail transportation policy.

A related argument—that parties have been denied a fair hearing—is also without merit. First it presupposes that our order fixes compensation when in fact it has the opposite effect. Second, even if it were deemed to establish compensation the procedures employed comply with those approved by the Supreme Court of the United States in *Florida East Coast Ry. Co.* v. *United States,* 410 U.S. 224 (1973).

I. *Financial effects on per diem lessors and lessees.*—The lessor in a per diem lease arrangement is a company such as Brae Corporation that either purchases boxcars itself or acts as an agent for individuals that purchase boxcars as investments. The railroad lessee receives free use of the car on its own lines. In exchange, it agrees to give preference in loading to the leased cars over any other cars it may have available, so as to get the leased cars onto the lines of other carriers where they can earn car hire or "per diem"[61] income. The lessee carrier agrees to turn over most or all of the car hire revenue earned by the cars to the lessor.

The per diem lease obviously is predicated on the present system of prescribed car hire. The relationship between per diem lessors and lessees will naturally change with the advent of empty return charges, car hire reclaims, and bargained car hire. It appears likely that there will be pressure on the lessor to reduce its revenue demands during slack periods.[62] Lessees have generally viewed these leases as a cost-free way to obtain cars. They may not be willing to absorb empty return charges so as to protect the lessor's revenue flow unchanged. If lessors were to insist on lessees' absorbing empty return charges, it seems possible that lessees could find more economical ways to meet their equipment needs.

Per diem lessors could experience some reduction in per car revenue during slack periods as a result of the exemption. If they decide to continue leasing cars in exchange for car hire revenue, the exemption will provide benefits that will at least partially offset this reduction. First,

[61] Car hire is still sometimes called "per diem", although it now contains a mileage element as well as a daily element.

[62] The present system probably does not shield per diem lessors completely from pressure to accept lower car hire during slack periods. In some instances, they may be granting partial car hire reclaims now to encourage reloading of their cars. But to the extent that the current scheme allows per diem lessors to earn higher returns than market condtions warrant, they could be adversely affected by the exemption in the short run.

because reduced net car compensation, reduced empty mileage, and improvements in boxcar marketing would make possible reduced freight rates, boxcar traffic could increase, and cars that would otherwise be idle could begin producing some revenue.[63] Second, freedom under the exemption for privately negotiated car hire rates will allow car hire revenue to rise above the prescribed level when demand for cars is strong.[64] Assuming a reasonable long-run balance between car supply and demand, we would expect per diem lessors to earn a competitive return over the full cycle.

Although the exemption could have a financial effect on per diem lessors, it will not adversely affect per diem lessees. Because these lessees provide valuable services in originating and terminating interline traffic, it is clear that connecting carriers will not imperil their ability to continue in operation. Certainly, the exemption will result in pressures on them to reduce empty car movements and to adjust car hire rates to market conditions, but they will not be asked to do anything they cannot accomplish by feasible changes in their car procurement arrangements.

As for shippers whose traffic moves in per-diem-leased cars, the impact of the exemption can only be positive. An end to inappropriate[65] recovery of equipment investment costs during slack periods should mean reductions in freight rates and in some cases an opportunity to obtain more economical rail transportation for goods that now move by truck.

J. *Effect of exemption on boxcar availability.*—Assertions are made that the car hire exemption will cause boxcars to become unavailable to short-line railroads and their shippers. They envision not only short-term disruption during a transition period but also long-term car scarcity as car owners lose their cars in foreclosure actions and future investments in boxcars are avoided.

These fears are generally premised on the use of empty return charges by Conrail and other large carriers to deprive car owners of needed revenue. Conrail, however, indicates that it is taking a gradual approach to implementing the exemption. This is essential to avoid any car supply or traffic disruptions, and Conrail states that it will continue to pursue this approach in future plans. Conrail has already announced to all other

[63] Other efficiencies made possible by the boxcar freight rate exemption should also stimulate traffic. Previous broad exemptions of fresh fruits and vegetables and TOFC/COFC service have been followed by strong traffic increases.

[64] Wall Street analysts reportedly believe that rail traffic is already in the formative stages of a cyclical recovery. See Mark B. Solomon, "Rail Performance Under Deregulation Keeps Wall Street Bulls Optimistic," *Traffic World*, September 12, 1983, page 22.

[65] Reduced recovery of capital costs during periods of reduced demand is a desirable and economically efficient occurrence which minimizes the idleness of capital assets and thereby benefits everyone.

carriers that it will continue all existing boxcar car service and car hire rules and agreements after the effective date of the exemption until superseded by a bilateral agreement or canceled by either party on 30 days' notice. It will impose no empty return charge on any carrier before there has been an opportunity for bilateral negotiations with that carrier. Its goal is to reduce empty mileage without imposing the charges. It has already concluded agreements with several class I and short-line carriers in which there is no provision for empty return charges.

We are confident that a similar attitude will prevail among other carriers. No carrier has anything to gain by disrupting the movement of profitable traffic and risking its loss to competing carriers or other modes of transportation.

Despite such care to avoid disruptions during the transition period, we cannot rule out the possibility that some equipment foreclosures may ultimately occur. Boxcar investments were often financed largely by borrowing due in part to a regulatory scheme that made such invesment appear riskless.

In general, we do not see foreclosures as a likely consequence of the exemption for most car owning carriers. These carriers are already exposed to market pressures on their overall revenue, and their present earnings are probably adapted to those pressures. Freight rate adjustments should suffice to avoid adverse impacts due to the exemption.[66] Per diem lessors, on the other hand, may have somewhat greater insulation from market pressures to accept less revenue when demand is low, so they could be more exposed to a changed environment under the exemption. If some of them are not strongly enough capitalized to withstand a more cyclical revenue flow, they could face equipment foreclosures.[67]

Even if financial difficulties befall some lessors, this will not cause boxcars to become unavailable to the rail system or its shippers. Either the insolvent companies will be reorganized or the cars will pass to the ownership of companies that are better adapted to operate in a car rental environment subject to market influences. In either case, the cars will not be scrapped as long as there are potential users. They will remain available for service.[68]

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[66] This is not to ignore that some of these carriers may be headed for foreclosures already because their high level of car ownership exceeds the present needs of the rail system and their idle cars are generating no revenue.

[67] Again, this is not to ignore that some of their difficulties may pre-date the exemption.

[68] To be sure, any default is a misfortune for those involved. But such a one-time occurrence should not assume greater importance than efficiency gains for the rail industry that will continue year after year.

Short-line railroads should not have difficulty procuring boxcars once the exemption becomes effective. Even in the unlikely event that a former lessor withdraws from the picture, other lessors should step in to fill the void with cars purchased at current market prices, and under lease arrangements that accommodate the earnings fluctuations expected in a less regulated market.[69] As market influences are brought to bear more heavily on boxcar resale prices, short-line railroads should also be able to purchase them on advantageous terms. Finally, with the car surplus that exists today, we question whether any short-line railroad would have difficulty procuring cars as needed from other railroads.[70]

In a market-oriented car compensation system, future car investments will be made only when they are needed. Once car compensation is influenced by market forces, there will be no further illusion for the investor that regulation guarantees a return on all car investments regardless of the size of the car fleet. Car purchase decisions will be based on forecasts of future car supply and demand, since adequate earnings to justify investment can be expected only where the supply of cars does not exceed the demand. Just as boxcar earnings will no longer be held up by regulation when demand is weak, they will no longer be constrained by regulation when demand is strong. Thus, investors will not be discouraged from making new investments in boxcars more than they would be from investing in any other business asset.

Finally, we remain aware that the car hire exemption has caused considerable anxiety for those who consider their financial well being at risk. We intend to monitor the operation of this exemption closely. As provided in section 10505(d), we are prepared to modify or revoke the exemption to any degree necessary to deal with unforeseen and unacceptable problems that may arise. At the same time, we assure those who make their plans in reliance on the exemption that we will not be alarmed at an occasional difficulty during the transition period; we will do nothing to weaken the exemption unless regulation becomes truly necessary to carry out the rail transportation policy.

K. *Outlook for recovery of boxcar service.*—The steps we are taking should make car compensation levels more responsive to car supply and demand, and should enable car owners and car users to work toward eliminating cross hauling empty cars, without our suddenly abolishing the familiar car compensation rules altogether. The question of a com-

[69] With the boxcar exemption in place, we expect that cars will be more heavily used and ultimately more profitable than if the present system were to continue unchanged.

[70] Even when there is no surplus, traffic available on a short line could be sufficiently profitable to cover high car hire rates or could utilize returning empty cars, thus assuring availability of cars owned by others.

plete elimination of car hire prescriptions for all types of cars is one that we shall consider in a separate rulemaking proceeding. Should we eventually decide to follow that course, the present limited car hire exemption for boxcars will have served as a valuable stepping stone.

Even with the boxcar exemption we are not confident that boxcar service will ever regain the patronage it once had. Truck competition is already very strong, especially with the freer entry and enhanced price competition that have resulted from reduced regulation of that industry. The inroads made on boxcar traffic by motor carriers could increase further as these carriers take advantage of relaxed truck size and weight limits to further reduce their unit costs of service. Some of the most promising opportunities for railroads today seem to be in specialized services such as large volume movements of bulk commodities that cannot be economically handled by trucks. Railroads are increasingly tailoring their services to this type of traffic. Yet as long as the capacity to provide boxcar service exists, the railroads must be given every opportunity to do it efficiently and economically.

At the least, our action in this proceeding should slow the decline of boxcar service. Perhaps it will even bring about a renaissance. In the case of fresh fruits and vegetables, declines in railroad traffic were dramatically reversed with the cessation of regulation. And, after deregulation of TOFC/COFC, the growth of this traffic in the face of a recession severely affecting other railroad services has been nothing short of astonishing.

The Southern Pacific Railroad cites the TOFC/COFC experience, including the absence of serious problems with unregulated compensation for trailer and container rentals, as its reason for giving its full support to our decision in this proceeding. A contrary argument from that experience, however, is made by the Iowa Railroad, which provides service over a portion of the former Rock Island line. This carrier contends that it has been unable to obtain interline agreements with some major carriers for TOFC/COFC service, a fact which it cites in illustration of the problems it believes short lines will have under the boxcar exemption.

We are not unconcerned with the Iowa Railroad's difficulties in interlining TOFC/COFC traffic, but we see less likelihood of similar difficulties for short lines in interlining boxcar traffic. It appears that many railroads have, in effect, become wholesalers of TOFC/COFC service, leaving the retailing, as it were, to freight forwarders and truckers. Because of the low profit margin on this traffic, they are handling it in high volume between major concentration points. For this reason, some carriers may not find it profitable to accept small numbers of trailer or container shipments from short-line railroads at locations other than the major staging areas.

Boxcar service, in contrast, is generally a plant-to-plant movement performed without participation by motor carriers. Indeed, it appears that major railroads depend on short lines to do the retailing of boxcar service much the way they depend upon trucks to retail TOFC/COFC service. The short-line railroads, with their greater staffing flexibility and their attention to local needs, are often able to operate successfully over lines that major railroads have abandoned as unprofitable. Because of the emergence of these small railroads, the trunk line carriers can often concentrate on providing line-haul services, where they are most cost-effective, and rely on short lines to provide the pick up and delivery service. It is a recognized fact that the short lines and majors have become indispensable partners of one another in the handling of a substantial amount of rail traffic.[71] Much of this traffic is transported in boxcars. It seems quite clear that in any resurgence of boxcar service following this exemption, the short lines must of necessity be full participants and beneficiaries.

What the short lines must understand, though, is that even in the absence of the exemption this Commission has no regulatory power to compel the major railroads to continue providing boxcar service once they cease to find it economically worthwhile. Carriers may now now raise their rates to the jurisdictional level without our intervention, thus driving away most or all boxcar traffic. Thus the decision to provide boxcar service is realistically that of the carriers, not that of this Commission. Artificial regulatory incentives and disincentives have resulted only in diminished boxcar use and a shrinking boxcar fleet. Cost control and marketing flexibility are the essential tools for making this service pay its own way, and these clearly have not been attainable under regulation. This exemption should improve the economic viability of boxcar use and make the service more attractive to the shipping public.

Some already view the boxcar as obsolete, but we make no judgment. This proceeding is to deregulate the boxcar, so that the market itself can judge whether this technology has a continued role in meeting the Nation's transportation needs.

IV. Implementation

Our May 2, 1983 decision postponed the effective date of the exemption for 6-months (to November 7, 1983) in order to permit the railroads a reasonable opportunity to prepare for the new deregulated environment. We understand that some progress has been made in negotiating bilateral agreements. However, many parties have held back anticipating

[71] See, *e.g.*, Robert D. Hershey, Jr., "Little Railroads That Think They Can," *New York Times*, September 18, 1983, page 1F.

substantial changes in the exemption as a result of the petitions for reconsideration.

On October 7, 1983, we authorized our General Counsel to represent to the Court of Appeals for the District of Columbia Circuit that we would not make the boxcar exemption effective sooner than 30 days after our disposition of pending petitions for reconsideration and petitions for administrative stay pending judicial review. We also note that the AAR has requested that the exemption become effective on the first day of a month in order to simplify accounting problems.

Accordingly, we have decided that the boxcar exemption will become effective on January 1, 1984. In order to permit us to decide whether to stay the exemption pending judicial review and to afford the court adequate time to consider any petitions for judicial stay that may be filed, we are directing the parties to file petitions for administative stay pending judicial review (or to supplement already filed petitions) within 15 days of service of this decision. We will issue a decision on petitions for administrative stay pending judicial review before December 1, 1983, thus affording the Court of Appeals a full 30 days to consider petitions for stay if we do not afford relief.

There is an additional issue which we would like to resolve now which may reduce the impetus for stay petitions and allay the fears of many class III carriers and the shippers they serve. We have received a large number of petitions and replies from class III railroad companies indicating that they are having difficulty preparing for the implementation of the boxcar exemption. They note that they may be required to enter into a large number of bilateral car hire agreements in a very short time. These small carriers, which provide important services to the shipping public, may lack the administrative personnel to prepare quickly for the transition to an ultimately beneficial new system.

Accordingly, we are extending the effective date of the car hire portions of the exemption as it applies to cars owned or leased by class III carriers to July 1, 1984. This action is intended to ameliorate the impact of these regulatory changes on class III carriers. We expect these carriers (and the car leasing companies that serve them) to use this additional time to negotiate satisfactory car leasing and interchange arrangements. If the class III carriers have made substantial efforts in this direction, but have been unable to complete the process by the deferred effective date established in this decision, we will entertain petitions to extend that date further to complete implementation efforts by these companies.

We make this concession to the class III carriers reluctantly. As we noted above, excluding the class III carriers from the partial car hire exemption may place their cars in a competitive advantage with respect

to cars of other carriers, and thus confer an unwarranted benefit on the class III's. It will also reduce the improvement in efficiency we hope will result from the exemption. However, if the concessionary period is limited to 6 months we do not expect that other carriers will be harmed to any significant extent. The deferral in effective date will afford the class III's the time they assert is needed to negotiate bilateral agreements. In view of the potential competitive advantage, though, we will not extend the concessionary period unless there is a substantial showing by the class III carriers of good faith efforts to implement the exemption.

CHAIRMAN TAYLOR, concurring in part and dissenting in part:

At the outset, let me commend the majority for their belated recognition of the adverse impacts the immediate implementation of this proposal would have upon the Nation's railroads and shippers, and in particular, upon class III carriers.[72]

Nevertheless, it is genuinely distressing, though not suprising, that the majority has turned a deaf ear to the many entreaties pointing out the fallacies of the initial decision. The denial here of all requests for reconsideration, modification, clarification, and oral argument does not serve to cure the deficiencies in the record, nor does it resolve any of the underlying problems brought to our attention by the many petitions and requests filed in this matter.[73] The highly important and disturbing consequences of the boxcar proposal have been extensively covered in the comments submitted by the numerous participants in this proceeding, both before and after the decision of May 2, 1983.[74] Therefore, as the majority seems to have nothing new to say, my remarks here will be briefly stated.

The instant decision and the initial decision share the same shortcomings. As noted in my prior dissent, "the grant of such exemption is based upon wishful thinking and unverifiable predictions and assumptions, all of which rely more on theory than fact."[75] If anything, based on petitioners' showings, it is now clearer than ever that approval of this pro-

[72]Naturally, I would have preferred a stay of the entire decision pending judicial review, especially in view of the confusion that can be anticipated as a result of our having established a dual schedule of implementation.

[73]In fact, except for moving the effective date to the first day of the month, the decision ignores the specific requests contained in the AAR's petition of October 7, 1983, wherein clarification was sought with regard to some specifically stated matters of concern.

[74]In my dissent to the decision of May 2, 1983, I noted the overwhelming opposition by representatives of the entire industry. Many of these railroads and shippers have actively endorsed and supported responsible railroad deregulation. Not one of these commentors, however, support this proposal. In fact, as the decision names only the three lone supporters, I feel obliged to credit, in the appendix to this dissent, those again left anonymous by the majority.

[75]*Exemption From Regulation— Boxcar Traffic*, 367 I.C.C. 424, 460 (1983).

posal represents a blatant abuse of the responsibility entrusted to us by Congress upon enactment of the statutory exemption provisions in 49 U.S.C. 10505.

In lieu of acknowledging the overwhelming opposition and the almost total lack of support, the majority's latest pronouncements conjure up a glowing fantasy world in which, once we have removed those carriers "headed for foreclosure,"[76] the remaining railroads will join together (presumably free from any antitrust concerns) and operate a national fleet of revitalized boxcars that will whiz gleamingly and efficiently around the country serving happy shippers without moving an empty mile. A pretty picture indeed, but far more a pipe dream than a reasonable expectation of things to come!

There are terminating and originating railroads, trunklines and short lines, and there are shippers that can and will use any boxcar as well as shippers that require either their own or specialized equipment. All of these parties are properly concerned with their own economic well being, because there is no national fleet, and no arm's-length bargaining is possible if only some railroads hold the high cards.[77]

Without any question, there *is* a substantial excess of empty boxcar mileage. The causes of the problem are numerous. They include the increasing obsolesence of boxcars, an economic climate which, although now improving, produced a surplus of equipment, traffic imbalances, and last but not least, the present system of car hire. Solutions are less obvious, but certainly the instant proposal, which has been grossly mislabeled as deregulation, is not one of them. Rather, the solutions are many and not one, and they lie within the private sector which, in fact, had already developed plans to remedy the problem.[78]

Another point which bears repeating is that this exemption, unlike those that exempted fresh fruits and vegetables, TOFC/COFC movements, and other commodities, was not designed to increase traffic share for the railroads.[79] TOFC/COFC is a new and innovative intermodal

[76] See the majority's footnote 66 and generally the discussion at section I.

[77] Majority's assertions that "the small carrier's bargaining strength is absolute * * *," would be laughable were it not for the fact that the decision here seriously jeopardizes the economic survival of the Nation's class III carriers. Many short lines have noted that their interlining trunk roads have refused even to meet with them, let alone negotiate bilateral car hire/car service agreements.

[78] Many carriers already have bilateral agreements which reduce or eliminate empty car-miles. Further, a number of railroads recently submitted a pooling agreement to the Commission for approval. This plan encourages the reloading of foreign pool cars without giving terminating or originating carriers undue leverage. Conrail, the railroad that chaired this group, withdrew after the Commission's decision to exempt boxcar movements.

[79] According to the Commission's own Environmental Assessment, 11.5 percent of all boxcar traffic may be diverted to motor carriage as a result of this proposal. Much of this diversion may be at the expense of the short line railroads whose shippers may now be forced to switch to motor carriers to reach the trunkline carriers.

service, while fresh fruit and vegetable traffic was found to be potentially competitive since it is essentially backhaul traffic. The use of boxcars, on the other hand, is declining, not because of regulation, but because boxcars have become less efficient than other types of more specialized equipment.

In a truly market-based system, the government would not interfere by concocting an artificial incentive designed to "revitalize" a business activity or endeavor that is fast becoming anachronistic. The partial and conditioned removal of regulation from one area to give it an *advantage* over a regulated segment is *clearly* such an artifical incentive. For example, a shipper who now uses flatcars or covered hoppers may switch to boxcars, or only be offered boxcars by the originating railroad, while the more efficient flatcar or covered hopper is stored.

Moreover, isn't it entirely conceivable that a railroad might find it beneficial to reload a regulated car, so as to collect the empty return or storage charges on a boxcar, instead of loading the boxcar and sending the regulated car home free? Obviously, a determination to reap this benefit would not be predicated upon the true economic value of the boxcar, but upon the special niche created for the boxcar by government interference.

In short, the boxcar exemption is not an "interim solution" but an interim interference. The confusion and fear this proposal has created, along with the litigation[80] and calls for reregulation it has generated, appear to be endless. Yet the majority's zeal remains unabated, despite the hard and damaging evidence provided by the parties which this decision is supposed to aid.

How much better it would have been for all concerned if the Commission had simply bitten the bullet, performed its statutory duty, and denied the exemption! We then could have directed our energies toward helping the industry resolve their car hire problems, relative to the usage of boxcars and also other types of equipment, in a fair and reasonable manner. Surely, such a course would have been preferable to the unilateral acceptance of this mongrel proposition, particularly when it appears the majority's prime motivation has been their self-induced delusion that they are serving the cause of deregulation.

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[80] More than 30 petitions for judicial review are now pending before the United States Court of Appeals for the District of Columbia.

APPENDIX

Parties submitting petitions for reconsideration, stay, modification, or other relief from the May 2, 1983, decision include:

Railroads

Kansas City Southern Railway Co.; Missouri-Kansas-Texas Railway Co.; Soo Line Railroad Co.; Association of American Railroads; Chicago and North Western Transportation Company; Illinois Central Gulf Railroad Company; Canadian National Railway Company; Canadian Pacific Ltd.; Bangor and Aroostook Railroad Company; Pittsburgh & Lake Erie Railroad Company; American Short Line Railroad Association; Angelina and Neches River Railroad Company; Apache Railway Company; Arkansas & Louisiana Missouri Railway Company; Ashley, Drew & Northern Railroad; The Force & Princeton Railroad; Atlanta & St. Andrews Bay Railway Co.; Bessemer and Lake Erie Railroad Company; Elgin, Joliet and Eastern Railway Co.; Cairo Terminal Railroad Co.; Cedar Rapids & Iowa City Railroad Co.; Central Vermont Railway, Inc.; Detroit, Toledo, and Ironton Railway Co.; Duluth, Winnipeg & Pacific Railway Co.; Grand Trunk Western Railway Co.; Chattahoochee Industrail Railroad; Columbia & Cowlitz Railway Company; Columbus & Greenville Railway; Corinth and Counce Railroad Company; Detroit & Mackinac Railway; Genesee and Wyoming Railroad Company; Green Mountain Railroad Corporation; Greenville & Northern Railroad Co.; Indiana Hi-Rail Corporation; Iowa Railroad Company; Iowa Terminal Railroad; Kyle Railways, Inc., and six affiliated short lines; Lancaster & Chester Railway Co.; Manufacturers Railway Company, et al.; Meridian & Bigbee Railroad Company; Michigan Northern Railway Company; Mississippi Export Railroad Company; Moscow, Camden & St. Augustine Railroad; National Railway Utilization Corporation; Pocono Northeast Railway, Inc.; Port of Tillamook Bay Railroad; St. Marys Railroad; Sandersville Railroad Company; Seattle & North Coast Railroad Company; Sierra Railroad Company; Stockton Terminal & Eastern Railroad; Texas South-Eastern Railroad Company; Valdosta Southern Railroad Company, et al.; West Virginia Railroad Maintenance Authority; The Old Augusta Railroad Co.; the Amador Central Railroad Co.; Arkansas Kraft Corp.; Little Rock & Western Railway Co.; the Apalachicola Northern Railroad Co.; and the Arcata and Mad River Railroad Co.

Shippers

American Forest Products Co.; Green Bay Packaging Corp.; St. Joe Paper Company; Simpson Timber Company; Weyerhauser Company; American Paper Institute; National Industrial Transportation League; International Paper Co.; Ford Motor Co.; Continental Forest Industries, Inc.; Great Southern Paper; Leaf River Forest Products, Inc.; and the Canadian Pulp & Paper Assn.

State and Local Agencies

Galveston Wharves Board of Trustees; Houston Port Bureau; and Greater Baton Rouge Port Commission.

Water Carriers

Sea-Land Service, Inc.; Sea-Land Freight Service; and Totem Ocean Trailers Express, Inc.

Car Leasing Companies

Brae Corporation and its subsidiary short lines; Itel Corporation and its subsidiary short lines; and Railway Progress Institute.

In addition, letters and comments were received from 68 U.S. Senators and 140 Congressmen.

V. ORDER

We reaffirm our decision to exempt boxcar service from regulation to the extent set forth in appendix D to our decision served May 2, 1983, with the exception that the authority for our action shall not include 49 U.S.C. 11122.

This action does not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Petitions for reconsideration of the decision served May 2, 1983, are denied.

2. The petitions for rehearing and further hearing are denied.

3. The exemption from regulation of boxcar traffic estabished in our May 2, 1983 decision is effective on January 1, 1984 (except as noted immediately below).

4. The effective date for implementation of the car service portion of the exemption, as it applies to cars owned or leased by class III carriers, is July 1, 1984.

5. Further petitions for administrative stay or supplements to already filed petitions for stay, are due 15 days after service of this decision.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

(SEAL) AGATHA L. MERGENOVICH,
Secretary.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 346 (Sub-No. 8)
EXEMPTION FROM REGULATION BOXCAR TRAFFIC

Decided: November 30, 1983
[Served Dec. 2, 1983]

DECISION

Numerous petitions[1] have been filed requesting that we stay pending judicial review[2] the effective date of our decision to exempt boxcar traffic from various provisions of subtitle IV of Title 49, United States Code. Consolidated Rail Corporation (Conrail) has replied. In addition, Burlington Northern Railroad and several shippers[3] filed petitions in opposition to a stay.

We served our original decision on May 2, 1983 to become effective November 7, 1983. We served our decision on reconsideration on November 3, 1983, essentially affirming our prior decision, and delaying the effective date of the exemption until January 1, 1984. In addition we extended the implementation date of the car service portion of the exemption as it applies to cars owned by or leased to Class III carriers to July 1, 1984. We noted that we would be prepared to grant additional time for the implementation process of those carriers if it is shown to be necessary. We also allowed parties 15 days to submit new stay petitions or to adopt all or portions of those previously filed. Numerous parties have petitioned the United States Court of Appeals

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[1] See Appendix A.

[2] And for a period six months beyond that time.

[3] Crown Zellerbach Corporation, James River Corporation and Union Camp Corporation. On October 18, 1983 the Chicago and North Western Transportation Company withdrew its prior petition to stay the effectiveness of the Commission's decision.

for the District of Columbia Circuit to review the Commission's decision.

Various parties have requested that we modify the effective date of our order from January 1 to February 1, to afford the court sufficient time to decide the issues raised by their petitions for judicial stay pending review. Assuming the parties to the judicial review proceeding confine themselves—as they are required to do—to the issues raised before us, we have no reason to doubt that 10 days, even taking into account the Christmas Holidays, will be adequate time for the court to consider and resolve the question of stay. This is particularly so because the court has recently disposed of similar requests under the identical statutory provision in *Coal Exporters Ass'n et al.* v. *U.S.*, No. 83-1629 et al. In addition, an effective date at the beginning of the calendar year would greatly facilitate the changeover to the new administrative reporting and accounting requirements resulting from the decision. Accordingly we deny the relief requested.

Finally, many of the arguments presented were treated extensively in our reconsideration decision, and will only be briefly referred to here for completeness.

A stay of an agency action pending judicial review is an extraordinary action that should not be taken except in the most unusual situations. A stay is not a routine action taken simply because an agency action alters the *status quo*; if that were the rule all significant agency actions would be stayed pending judicial review. Cf. *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301 (1976) (Opinion of Justice Rehnquist in chambers). Rather, a party seeking a stay pending judicial review must establish: (1) that it will suffer irreparable harm absent a stay; (2) that other interested parties will not be substantially harmed by a stay; (3) that it has a substantial likelihood of prevailing on the merits; and (4) that the public interest favors a stay. *Washington Metropolitan Area Tran-*

sit Comm. v. *Holiday Tours*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). Petitioners have met none of these criteria, as discussed below. Accordingly, we will not stay the decision.

I. THE PUBLIC INTEREST

As the court explained in *Virginia Petroleum Job. Ann.* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958):

> In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes.

In *Yakus* v. *United States*, 321 U.S. 414, 440-41 (1944), the Supreme Court characterized the public interest prerequisite to the granting of a stay as of paramount importance in administrative agency cases.

The numerous public benefits of the boxcar exemption, set forth in detail in both the May and November decisions, weigh heavily against the granting of a stay in this proceeding. The exemption will allow rail carriers to minimize or eradicate car use practices which all parties agree are inefficient. The exemption will reduce the tendency of the current boxcar interchange system to create empty movements by deterring carriers with a shipment to load from loading their own equipment and returning available foreign boxcars empty. This cross-hauling of empty cars is prevalent now in times of slack demand because loading its own equipment rather than empty foreign equipment increases the loading carrier's per diem revenue more than it increases the cost of moving the empty cars. By discouraging these inefficient practices, the exemption will increase greatly the efficiency of the rail network as a whole and reduce costs, including those to shippers.

Further, a more market based car hire system will assure that carriers furnishing cars will only supply cars that are needed for efficient transportation. The

existing prescribed car hire system encourages investors to acquire cars without regard to the adequacy of the existing fleet. Because car hire is prescribed and interchange is mandatory, connecting carriers must accept cars and make car hire payments even if these payments and the cost of moving the cars negate all freight revenues. Also, prescribed car hire provides earnings proportional to a car's purchase price, which encourages the acquisition of expensive cars. The exemption will give all carriers involved in a movement a mechanism and an incentive to reduce the total cost of boxcar transportation so that the rapid decline of boxcar traffic can be arrested. Rail carriers cannot perpetuate these inefficient practices if boxcar service is to meet the challenge of motor competition.[4]

The exemption will promote efficient pricing of boxcar service—both in transportation and car service—by removing procedural regulatory burdens and allowing rail management to respond flexibly to market conditions. These substantial public interest benefits weigh heavily against the granting of a stay.

II. PETITIONERS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Although the various parties have raised numerous issues which they assert will require reversal of the boxcar exemption, a review of these issues demon-

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[4] American Trucking Associations, Inc., opposes the exemption on the grounds that continued regulation of boxcar traffic is needed to protect motor carriers from competitive rail rate reductions on backhaul traffic. The Commission, however, is precluded from holding up rail rates to protect another mode of transportation where reduced rates contribute to a railroad's going concern value. 49 U.S.C. 10704(a)(2). Rates that cover only a carrier's directly variable costs, which are quite low in the case of backhauls, are conclusively presumed to contribute to going concern value. *Cost Standards for Railroad Rates*, 364 I.C.C. 898, 905 (1981).

strates that none is so substantial as to make it likely that petitioners will prevail in court. This is particularly true inasmuch as we are acting pursuant to an express delegation of legislative authority to determine what activities should be exempted from regulation. Under these circumstances the courts have said that the agency is operating "at the zenith of its powers" and that "its regulations are entitled to more than mere deference or weight." *American Trucking Ass'ns, Inc.* v. *U.S..*, 627 F.2d 1313 at 1320 (D.C. Cir. 1980) citing *Batterton* v. *Francis*, 432 U.S. 416, 425-26 (1977).

A. The Record is Fully Adequate to Support the Exemption

NITL, Weyerhaeuser and Brae argue that the record in this exemption proceeding was deficient, and that market share data submitted by Conrail regarding commodities which normally move by boxcar was biased because it only covered the Northeastern portion of the country. They imply that it was Conrail's burden to demonstrate affirmatively that no railroad in any part of the country has market power with regard to the transportation of any commodity by boxcar. This argument reflects a basic misunderstanding of the exemption process as created by Congress and defined by the courts in numerous recent decisions.

Our conclusion that exempting boxcar traffic from regulation will be consistent with the rail transportation policy and will not result in an abuse of market power is the type of determination which the courts have said is "primarily of a judgmental or predictive nature." See *FCC* v. *Nat'l Committee for Broadcasting*, 436 U.S. 775, 813, (1978). The courts have recognized that complete factual support in the record for these predictions is not possible or required. This is a case where "'a forecast of the direction in which the public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *Id.* citing *FPC*

v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). See also *National Small Shipments Traffic Confeence* v. *CAB*, 618 F.2d 819 (D.C. Cir. 1980). The United States Court of Appeals for the Fifth Circuit has said that "to hold otherwise would paralyze agencies merely becaue the future is not subject to proof." *Missouri-Kansas-Texas R. Co.* v. *United States*, 632 F.2d 392, 406 (5th Cir. 1980).

As the court recognized in *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981) *(ATA)* the exemption process is basically experimental. The policy underlying section 10505 is that Congress has been able to identify broad areas where reduced regulation is clearly warranted, but that "the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress."[5] The conferees expected that "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed through the use of section 10505, and that the Commission will adopt a policy of reviewing carrier action after the fact to correct abuses of market power."[6] The court in *ATA*, *supra*, 656 F.2d 1127, recognized that it is impossible to predict ahead of time precisely what impact an exempt[illegible] will have:

> T[illegible] Congress recognized that the effects of a parti[illegible]ar exemption decision could not be predicted w[illegible] certainty—and thus that the Commission would be exercising its exemption authority in the face of uncertainty as to the effect of an exemp-

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[5] H. Conf. Rept. No. 96-1430, 96th Cong. 2d Sess. 105 (1980) (Conf. Rept).

[6] *Id.* at 105.

> tion—is apparent both from the controlling statute and legislative history.
>
> All that this agency can do is to assure that "all relevant factors were considered and ... articulat[e] a rational connection between the facts as it finds them and the conclusion it premises on those facts." *Id.*

Further, although the Staggers Act eliminated the requirement that we conduct a proceeding before ordering an exemption (see *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731, 736-37 (1981)) we received three rounds of comments and held oral argument before issuing our May 2, 1983, decision. In addition since that first decision we have received petitions for reconsideration, replies, and petitions for stay, which are replete with factual references. All of these facts were considered in the reconsideration decision. The record is extensive, and it fully supports the exemption. All parties have had numerous opportunities to submit evidence, but none has come forward with any affirmative evidence that undermines the conclusion that regulation is not needed to protect shippers from an abuse of market power or to further the rail transportation policy. There is no evidence to support the supposition of NITL, Weyerhaueser and Brae that commodities transported by boxcar are captive to individual railroads in any region of the country, or that any rail carrier will be able to abuse its market power under an exemption.[7] This conclusion was based on a rational assessment of the evidence submitted and upon our considerable and recognized expertise in assessing

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[7] Here as in instances where we have promulgated a rule of general applicability "it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable." *United States* v. *Allegheny Ludlum Steel*, 406 U.S. 742, 749 (1972).

competition in the transportation industry. *Minneapolis & St. L. Ry. Co.* v. *United States*, 361 U.S. 173, 186-109 (1959); *Seaboard Airline R. R. Co.* v. *United States*, 382 U.S. 154, 156-157 (1965); *Northern Lines Merger Cases*, 396 U.S. 491 (1970).

Moreover, if experience proves that the exemption does not work as planned, we will exercise our statutory authority to modify or revoke it.

B. Boxcar Exemption Must Be Judged Under 49 U.S.C. 10505

Several petitioners attempt to apply various provisions of the act other than section 10505. That section sets out the criteria for granting an exemption upon which the agency and the court must focus. An exemption must be granted if regulation is not necessary to carry out the rail transportation policy of section 10101a and regulation is not needed to protect shippers from the abuse of market power.[8] No petitioner has shown that this standard has not been met.

Weyerhaeuser incorrectly contends that this proceeding is not an exemption under 49 U.S.C. 10505, but a rulemaking, and it characterizes as a rule the car hire exemption to allow empty return charges not exceeding 35 cents per mile. But as explained in the reconsideration decision, this is not a rule but a partial exemption, subject to conditions. The exemption allows carriers to take certain actions regardless of whether they are inconsistent with the terms of compensation prescribed for freight car rental under 49 U.S.C. 11122. A conditioned exemption is a proper exercise of our power under 49 U.S.C. 10505 if the statutory criteria for an exemption under that section are met, as here. Although

[8] Brae incorrectly argues that no findings were made on these essential criteria. To the contrary, our findings are set forth at 367 I.C.C. 460.

we could have exempted the carriers from boxcar car hire regulation altogether, we chose not to do so. Rather, we took an intermediate step to allow the progress of the program to be monitored, and to create a less abrupt transition from the present system.

On a related issue, several parties have objected to reliance upon authority of 49 U.S.C. 11122, in addition to that of 49 U.S.C. 10505, in granting the partial car hire exemption. In the reconsideration decision we withdrew any reliance on section 11122 as authority for approval of the proposal, and emphasized that we are exempting boxcar compensation from the requirements of that section to the extent that those requirements may be inconsistent with the actions we are permitting. Thus, we have neither relied upon the authority of section 11122 nor do we need to adhere to the requirements of its procedures. The exemption, then, must be judged by the criteria of 49 U.S.C. 10505, not those of 49 U.S.C. 11122.

C. Class III Carriers Have Bargaining Power

Several parties contend that the rail transportation policy requires continuation of the current car hire regulatory scheme for boxcars because of the inequality of bargaining power between the major rail carriers and the Class III carriers. They argue that meaningful bargaining of new car hire contracts will be impossible, and that the major railroads will impose exorbitant costs upon the smaller carriers that will threaten their existence. We explained in detail in the reconsideration decision why the major railroads can not afford to undermine the health of the Class III carriers that supply them with an essential flow or traffic. In essence, the penalty for a large connecting carrier that fails to allow the small carrier its required revenue is loss of this traffic and loss of a contribution toward its own capital costs. It is this partnership of interest, not regulation,

that prevents large carriers from driving these smaller carriers out of business.

Our assessment of the respective competitive positions of large and small carriers following implementation of this exemption is very similar to the assessment we are routinely required to make of the probable effects of a merger upon competition. As such it is specifically the sort of predictive judgment with respect to future carrier economic conditions to which the United States Court of Appeals for the Fifth Circuit deferred in upholding our BN-Frisco merger decision. *M-K-T, supra.*

Even if we were to accept the arguments of the Class III carriers as true, this would not be a basis for invalidating the exemption. The fact that an agency action affects segments of an industry differently is not a bar to its implementation. See *American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 630 (D.C. Cir. 1966) (en banc), *cert. denied*, 385 U.S. 843. Here, as in cases involving incentive per diem, any harm to the smaller carriers would be outweighed by the benefit to the railroad industry and the shippers it serves. *United States* v. *Florida E. Coast Ry. Co.*, 410 U.S. 224 (1973) and *Florida E. Coast Ry. Co.* v. *United States*, 368 F. Supp. 1009 (N.D. Fla. 1973), affirmed *per curiam*, 417 U.S. 901 (1974).

D. The Exemption Will Not Permit Joint Rate Cancellations That Are Contrary to the Public Interest

A few of the pleadings assert that the exemption will lead large carriers to eliminate joint rates to the detriment of small carriers. This argument was considered at length in our first decision and we concluded that it was without foundation. Joint rates can generally be eliminated even under regulation, particularly on unprofitable traffic, although litigation can make the process unnecessarily expensive and time cosuming.

Where particular joint rates are not the most efficient routes available, the public interest (and the governing statute, 49 U.S.C. 10905(e)) favors their elimination. Only by concentrating on the most efficient routes can carriers meet the pervasive competition they face on boxcar traffic. If a route is the most efficient available, the carriers should preserve it if they are to keep their costs down and remain competitive, whether it is a single or a joint line movement.

The Sandersville Railroad company contends that because section 10705a of the act contains "special protections" for Class III carriers, the Commission cannot exempt boxcar rates and service pertaining to them. But section 10505 contains only three express limitations to the exemption power, none of which is relevant here. (These concern carrier liability for claims, intermodal ownership, and employee protection). As long as the statutory criteria are met as they are here, the Commission can exempt carriers from the requirements of any other provision of the act. Moreover, we have given special attention to the needs of Class III Carriers, and our decision provides extraordinary relief for them.

E. Long Haul Paper and Pulp Not Subject to Market Power Abuse—Market Dominance Not Relevant

The American Paper Institute fears that its member companies will be subject to monopoly rates under exemption because 90 percent of movements of paper and pulp for distances of 900 miles or greater are handled by rail carriers. This does not demonstrate, however, that any single rail carrier possesses market power over particular movements. To the contrary, for movements of this length, several routes tend to be available and intramodal competition is strong. Rail carriers will not have authority to set these rates collectively under the exemption. Also, motor-rail combinations present

effective potential competition, and large volumes of this traffic now move by truck. In sum, the percentage API offers shows nothing more than the fact that rail transportation has been preferred to date, not that individual carriers will be in a position to abuse market power.

NLTL objects that the rate exemption removes the protection of the market dominance provisions of the act. We reiterate that the Commission can exempt carriers from the requirements of any provision of the act not specifically excluded, including market dominance. Moreover, our determination to grant the exemption is premised on a finding that continued regulation is not needed to protect shippers from an abuse of market power.

F. No Taking Without Just Compensation

Several parties have contended that the car service exemption results in a deprivation of property without just compensation. The exemption merely subjects car compensation to the forces of supply and demand, and boxcar investors do not have a constitutional right to a regulatory guarantee of a particular return on investment. Indeed, this would not be consistent with the mandate of the rail transportation policy, 49 U.S.C. 10101a(1) "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." Every exemption necessarily affects the fortunes of those businesses which were benefitted by regulation. Nevertheless, that does not preclude the agency from granting an exemption where regulation is not needed to further the rail transportation policy.

G. Congressional Intent and Regulatory Inducements To Investment Do Not Preclude Exemption

Several parties contend that because numerous Congressmen and Senators have written letters to the

Commission expressing their concern about the boxcar exemption, it must be contrary to Congressional intent. Congress certainly has been made aware of the arguments of those who oppose the exemption. Oversight hearings have been held in both houses, and several pieces of legislation which would modify the exemption have been proposed. Yet after due considertion, Congress has chosen not to act on this subject, thus negating any inference that the Congress opposes the exemption.

Several petitioners imply that because they were encouraged by Congress to invest in boxcars, the agency is precluded from taking any action that affects that investment. The particular inducements petitioners refer to are the investment tax credit, accelerated depreciation, and the fair return standard for car hire of 49 U.S.C. 11122. Both accelerated depreciation and the investment tax credit are incentives available for capital investments in all industries, and they have no special relevance to boxcars. The car owners have already realized benefits from these provisions in terms of reduced taxes, and nothing in the tax laws requires that they also be benefitted by insulating their investments from competition.

The carriers have been exempted from the specific requirements of section 11122 so that returns on car ownership will be subject to market forces rather than to a prescribed "fair return" level. Petitioners' argument that Congressional policy precludes this lessening of car service regulation cannot withstand scrutiny. We reiterate that Congress has directed us actively to pursue exemptions, and matters related to car rental have not been excluded from this mandate.

In a similar vein, the Angelina and Neches River Railway Company contends that because the Commission ordered it to acquire cars in Ex Parte No. 241, *Investigation into the Adequacy of Freight Car Owner-*

ship, the Commission is precluded now from taking any action which affects that ownership. Contrary to the implication of their pleading neither Angelina nor any other carrier was ordered by the Commission to acquire a single car as a result of the Ex Parte No. 241 investigation. Moreover, it is not clear that there is in fact any connection between the Commission's 1964 decision and the railroad's acquisition of cars in the late 1970's. In any case, railroad companies have an obligation to obtain adequate equipment to provide common carrier service as required by their shippers. Nevertheless, that does not mean they have a right to a guaranteed return on that investment.

H. Through Movements with Canadian Carriers Should Not Be Excluded

Canadian National Railway Company and Canadian Pacific Limited assert that the exemption will be 'incompatible" with the Canadian scheme of regulation. But the Canadian carriers have not explained how the alleged incompatibility would disrupt international traffic. To the extent that they are concerned that they will lack the marketing flexibility which the exemption affords United States carriers, this is no reason to handicap the latter. A similr argument was raised and rejected by the court in *ATA*, 656 F.2d 1122-1123, with regard to the alleged incompatibility of the TOFC/COFC exemption with FMC regulation on joint rail-water-movements.

I. ALASKA RAILROAD SHOULD NOT BE EXCLUDED

Sea-Land Service, Inc. (Sea-Land) and Totem Ocean Trailer Express (TOTE) maintain that regulation is necessary to prevent predatory pricing by the Alaska Railroad (ARR). To the contrary, the structure of the Alaska transport market would doom any future predatory pricing policy to failure.[9] Sea-Land and TOTE

have a combined market share of 70 percent of the freight surface traffic while ARR has only 25 percent. Given this low market share, it is not plausible that ARR would seek to drive its competitors out of the market in order to achieve monopoly returns later. Sea-Land and TOTE have substantial resources to withstand vigorous rate competition. Sea-Land is the world's largest containership operator and it in turn is owned by R.J. Reynolds Industries. TOTE, which invested substantial revenues establishing its position in the Alaska trade, is similarly well-funded. The prospect that ARR could cause these two companies permanently to scrap their assets and forsake the Alaska trade altogether is not a serious one. Certainly, if the ARR were to pursue such a policy, it would be a matter of high visibility, and we could immediately revoke the exemption as to it if such actions were to occur.[10]

In conclusion, petitioners hve identified no substantial issue upon which they are likely to prevail in court.[11]

III. PETITIONERS HAVE FAILED TO DEMONSTRATE *THAT THEY WILL BE IRREPARABLY HARMED*

Irreparable injury is a key factor in determining whether or not a stay pending judicial review should be

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[9] Nor do we think it would ever be in the interest of the State of Alaska (which will soon assume ownership of the ARR) to attempt to cripple the two ocean carriers that are serving it so well.

[10] Other issues concerning the ARR were dealt with extensively in our reconsideration decision, pp. 748-752.

[11] Brae argues that the Commission has not complied with the requirements of the Regulatory Flexibility Act. The Commission's original decision contains an adequate analysis as required by that act. Further, our analysis under that statute and our compliance with its requirements cannot be a basis for judicial review. See 5 U.S.C. 611. Thus, Brae could not prevail on this issue in court.

granted. As the court emphasized in *Virginia Petroleum Jobbers* 259 F.2d at 925:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy expended in the absence of a stay, are not enough.

This standard was further explained by the court in *Holiday tours*, 559 F.2d at 843 n.3:

> The mere existence of competition is not *irreparable* harm in the absence of substantiation of severe economic impact.

Petitioners have clearly failed to meet this burden.

First, because we have postponed the effective date of the car hire portions of the exemption as it applies to cars owned or leased by Class III carriers to July 1, 1984,[12] these companies and the leasing companies which serve them will not be seriously affected by the exemption.[13] We have indicated that we will entertain petitions to extend that date further to allow implementation efforts by these companies to be completed if necessary. They should thus suffer no harm pending judicial review. If the implementation date is drawing near, and the litigation has not been completed we will

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[12] Brae's claim that the exemption is retroactive is plainly erroneous. Exempt behavior is only allowed after the effective date. Further, we explained on reconsideration why excluding cars purchased before the effective date would destroy the exemption.

[13] Various Class I carriers have argued that they will be disadvantaged because the exemption will not apply to Class III carriers for six months. This is the reverse of the argument raised by the Class III carriers concerning the long-term impact of the exemption that we addressed above at p. 11. Those arguments apply with equal force here. Also, we should note that we have excluded only 12.27 percent of the fleet (Brae, Littlefield Affidavit) for only six months. We have no reason to believe that the industry will be unable to resolve any temporary problems which this limited exclusion may create.

also entertain further petitions at that time for administrative stay pending completion of judicial review.

Various petitioners have argued that they will be irreparably harmed pending litigation by (1) administrative expenses of preparing for implementation and of restructuring longstanding relationships, (2) a reduction in car hire revenues, or (3) a disruption of boxcar service. In addition, Sea-Land contends that it will be forced out of business by predatory pricing of the ARR. None of these alleged harms constitutes irreparable harm which justifies a stay.

First, a stay should not be granted merely because the exemption requires petitioners to restructure longstanding relationships. The same could be said for any important exemption or regulatory change. Nevertheless, change by itself does not constitute irreparable harm. Admittedly, there will be some administrative costs involved in negotiating new car use agreements, but we are convinced that these costs are relatively minor in comparison with the immediate and long term benefits the exemption will produce.

Several parties argue that until the court acts on the pending petitions for review "the character of the exemption will remain subject to change," and they cannot begin to prepare for implementation. They claim that they need six months after the termination of judicial review in order to prepare for implementation. Again, the same could be said for any agency case which is challenged in court; the court could require a change. As discussed previously, petitioners have raised no serious issue which would make reversal of the exemption likely.

The Commission has not modified the exemption except to allow Class III carriers further time for implementation. Almost six months have passed during which time these parties should have been preparing for the new system, and, indeed, many are doing so.

Others should not be allowed to profit by their own procrastination.

The claims of confusion as to what the exemption means and "what form it will take" are disingenuous. The exemption is relatively simple and remains unchanged since the May 2 decision.[14] As with any exemption, of course, there are numberous minor details which must be resolved by those affected.[15] No problem has been raised which inhibits meaningful negotiations, but if such a problem were to arise the Commission is prepared to assist rapidly in its resolution.

Many of the petitioners are car owners who are concerned that subjecting car hire compensation to marketplace pressures will undermine their investment in boxcars. Nevertheless, the courts have conistently held that additional competition does not constitute irreparable harm. *Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 297-98 (1974) *Holiday Tours*, 559 F.2d at 843 n.3. We note that the specific predictions of decreased car hire earnings are based on assumptions that the maximum allowable charge will be imposed in all cases and that no offsetting change in freight rates can be made. This as-

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[14] The exemption does the following: (1) it frees carriers from rate regulation and (2) it allows carriers (a) to impose empty mileage charges not to exceed 35 cents a mile (b) to impose charges to offset per diem three days after unloading of the car and (c) to enter bilateral car hire agreements. Petitioners have raised only two specific areas of "uncertainty" and these were both resolved on reconsideration. The two questions raised were: (1) does car hire continue to accrue when any empty return charge is imposed? (Yes) and (2) can storage charges be larger than the car hire charges during storage which they are designed to offset? (No)

[15] The Association of American Railroads has filed a petition for clarification. The parties will be advised of our disposition of this pleading well in advance of implementation on January 1, 1984.

sumes that the carriers who originate the traffic have absolutely no bargaining power and will be unable to negotiate bilateral agreements concerning car hire. (None of the agreements negotiated thus far requires the parties to pay any empty return charges.) Offsetting rate changes are possible if empty return charges shift car costs from terminating to originating roads.[16] In sum, petitioners' predictions of the effect of the exemption are extremely speculative and are directly contrary to the Commission's conclusions. Thus these predictions can not be given substantial weight.

The exemption will not, as Brae and Itel[17] imply, make it impossible for them to continue business as car leasing companies. They may, however, wish to alter their contractual arrangements with the carriers to whom they supply cars. They may choose not to be compensated by car hire pass-through if car hire is variable. Nevertheless, this change does not amount to irreparable harm.

The exemption will not bring a serious disruption in boxcar service. There is no reason to believe that any carrier by its pricing or car hire practice would price itself out of the market or make it impossible for a connecting carrier to continue to do business. See discussion, supra pp. 9-12. The Commission faced simi-

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[16] We expect that typically the originating carrier's rate will be slightly higher, the terminating carrier's rate lower, and the overall rate lower. This reflects the fact that the car costs of terminating carriers will be reduced as will overall costs. These lower costs must be translated into lower rates if boxcars are to remain competitive. At the same time originating carriers must be allowed to cover their costs or they will not be able to continue to supply traffic.

[17] Most of the customers of these companies are Class III carriers who are not now affected by the exemption because we have extended the effective date of the car hire portion of the exemption as it applies to the Class III carriers until July 1, 1984.

lar claims as it prepared to exempt fresh fruit and vegetable and TOFC/COFC traffic. Yet the transition to deregulation in those areas was smooth, and the dire predictions of opponents did not come to pass. Indeed, both exemptions resulted in a dramatic resurgence of rail use by the shipping public.

The allegation that the exemption will cause irreparable harm in terms of loss of traffic to competing modes is faulty and plainly runs contrary to the expectations of the motor carrier commentors in this proceeding. Carriers can raise their rates now on boxcar traffic because the rates typically are considerably below the jurisdictional threshold level. Competition keeps the rates down. Under an exemption, as carriers control their costs, they will be able to reduce rates and attract additional traffic. The record demonstrates the historical diminution of boxcar traffic, and the exemption should afford the railroad industry an opportunity to counteract this traffic loss through provision of more attractive, less costly service.

Finally, the risk that the exemption will enable the Alaska Railroad to drive its competitors, Sea-Land and TOTE, out of business while this litigation is pending is non-existent as explained, *supra*, at pp. 15-16. In addition, the administrative costs which Sea-Land alleges it will suffer are merely the incidents of normal competition. Sea-Land has not shown why it should be sheltered from costs which every competitive carrier, including ARB and TOTE, must face.

IV. A STAY OF THE EXEMPTION WILL CAUSE HARM TO OTHER PARTIES

As the court recognized in *Ambach* v. *Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982), "the persuasiveness of petitioner's threatened irreparable harm is greatly diminished when its prevention will visit similar harm on other interested parties." The railroad industry and the boxcar shippers it serves will be harmed by a stay be-

cause they will be deprived of the benefits afforded by the exemption. Substantial unnecessary costs and inefficiencies caused by current regulation of rates and car service have been identified which the exemption will minimize or eliminate. The rail share of transportation of commodities that can move in boxcars has declined and continues to decline precipitously, and thus a delay in reducing costs and rates could mean additional losses in the rail share of the trafic that might never be regained. If this decline is not halted soon, boxcar service may well disappear.

Conrail has indicated that it will implement the exemption gradually and petitioners infer that a delay will thus cause no harm. Implementation is likely to be gradual regardless of when it begins. The point is that the sooner this process can be started, the sooner the parties can begin to remove the inefficiencies the current regulatory system creates.

Conrail, Southern Pacific, Burlington Northern, and two short lines, Bay Colony Railroad and the Delaware Ostsego System have already reached bilateral agreements to improve car hire practices. These agreements will become effective at the same time as the exemption. Conrail has announced that it will refund $50 on any shipment made in a western railroad's plain boxcar moving west off Conrail, and that it will reduce car hire rates for loaded and empty Conrail boxcars moving on other railroads by 20 percent. These are not illusory benefits but real and immediate savings for shippers. The claims by petitioners that rail cost savings on this competitive traffic will not be passed along to shippers are unwarranted. They must be passed along or the traffic will be diverted to other more competitive alternatives.

Finally, Weyerhaeuser claims that a stay that would prevent the railroad industry from realizing efficiencies does not constitute irreparable harm. This argument must be rejected because it is inconsistent with Con-

gressional directions to remove inefficient regulation immediately so that the railroad industry can survive.

As noted in Section 2 of the Staggers Act:

> (6) earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements;
>
> (7) by 1985, there will be a capital shortfall within the railroad industry of between $16,000,000,000 and $20,000,000,000;
>
> (8) failure to achieve increased earnings within the railroad industry will result in either further deterioration of the rail system or the necessity for additional Federal subsidy; and
>
> (9) modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads to save energy and combat inflation.

Given this Congressional mandate we cannot disregard harm because it is "mere savings."

CONCLUSION

Petitioners have failed to demonstrate that they are likely to prevail on the merits or that the injury to them if we deny the stay outweighs the serious injury to other parties and the public from a further delay in the implementation of the exemption.

It is ordered:

(1) The petitions for stay pending judicial review and for further postponement of the effective date are denied.

(2) This decision is effective on the date of service.

By the Commission, Chairman Taylor, Vice-Chairman Sterrett, Commissioners Andre, and Gradison. Chairman Taylor dissented with a separate expression.

JAMES H. BAYNE
Acting Secretary

(SEAL)

Chairman Taylor, dissenting:

Petitioners[1] have presented justification for a stay pending completion of judicial review in accordance with the criteria for deciding stay requests as set forth in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-3 (D.C. Cir. 1977).

They have presented a substantial case on a number of serious legal issues and have demonstrated that there is a likelihood they will succeed on the merits in court. Paramount among those issues are the majority's unsubstantiated conclusions that continued regulation of boxcar transportation is not needed to protect shippers from the abuse of market power or to carry out the rail transportation policy of 49 U.S.C. 10101a, especially as these assumptions are based on abstract theory and speculation rather than evidence sufficient to satisfy the criteria of 49 U.S.C. 10505.[2]

Petitioners have also shown that if the exemption takes effect, they, as carriers, shippers, and owners of boxcar equipment, will be irreparably injured through losses of markets, traffic, earnings, and the ability to compete. They have documented the substantial harm they will suffer from both the removal of regulation from boxcar rates and the fundamental restructuring of long-standing relationships in the car hire nd car service areas.

These injuries may be further aggravated by the 6-month difference in implementation dates. This artifi-

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[1] There were 23 petitions (including one filed by four brick associations which was not listed in Appendix A), plus supplements, from over 116 parties, including all classes of railroads, shippers, and trade associations.

[2] For a more comprehensive discussion of the numerous legal deficiencies, see my separate expressions to this proceeding in 367 I.C.C. 424, 460 (1983) and 367 I.C.C. 746, 777 (1983).

cial bifurcation will impose administratively impossible burdens on all parties in dealing with both regulated and deregulated boxcars during the first six months of 1984. As has been pointed out by several Class I railroads in their petitions, the problems of implementation cited by the majority to support the bifurcation are equally applicable to all railroads, and not just Class III's.

Alternatively, almost all of the alleged advantages of the exemption, which are supposed to benefit those few parties opposing the stay, are already available and in use under the current system.[3] Any other advantages (none of which have been documented) that might possibly accrue to these parties, should the exemption take effect, would be at the expense of others and would be outweighed by the irreparable harm that most of the parties would suffer.

Lastly, in view of the far-reaching consequences of this exemption for the transportation industry, for shippers, and for the public, I cannot find that it would be in the public interest to impose sweeping revisions of the current system until the substantial issues before the court are resolved.

With this decision, the majority has now tried three times to justify this misbegotten proposal and has failed

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[3] Railroads today have many freedoms under the Staggers Act. They are publishing reduced rates on boxcars and engaging in flexible pricing and bilateral agreements. Contract rates under 49 U.S.C. 10713(a) have been extensively used. Cancellations of joint rates, gateway routings, and reciprocal switchings are also available under the current statutes. Although the majority has characterized the use of these statutes as "unnecessarily expensive and time consuming" (majority at Section IID) the statutory relief now available can be easily obtained consistent with the protections afforded captive shippers and smaller railroads.

each time to garner the support of more than a few.[4] One would assume that if indeed this exemption were the answer to the boxcar problem, then surely some other railroads and shippers would, by now, have joined in its defense.

Obviously, support for the exemption is thin because (i) it will benefit only a few to the detriment of many and is thus unwanted, and (ii) it represents unneeded government intrusion into matters which the rail community is striving to resolve on its own. Consequently, the majority's continuing insistence on implementation prior to court review smacks more of zealotry than careful analysis.

Hopefully, when the foregoing arguments are presented in court, they will be accorded the recognition they failed to receive from this Commission.

[4] Compare the 116 parties from all areas of the transportation industry requesting a stay versus the two railroads and three shippers that oppose it.

APPENDIX A

1. *Sea Land Service, Inc. Sea Land Freight Service, Inc.
2. *Brae Corporation and 67 short line railroads
3. *Angelina and Neches River Railroad Company
4. *Bangor and Aroostook Railroad Company
   Delaware and Hudson Railway Company
   Maine Central Railroad Company
5. *International Paper Company
   Ford Motor Company
   Continental Forest Industries, Inc.
   Illinois Central Gulf Railroad Company
   The Kansas City Southern Railway Company
   Missouri-Kansas-Texas Railroad
   Soo Line Railroad Company
   Chattahoochee Industrial Railroad
   Great Southern Paper
   Leaf River Paper Products, Inc.
   The Old Augusta Railroad Company
6. *Weyerhaeuser Company
7. Central Vermont Railway, Inc.
   Detroit Toledo and Ironton Railroad Company
   Duluth Winnipeg and Pacific Railway Company
   Grand Trunk Western Railroad Company
8. *Sandersville Railroad Company
   American Short Line Railroad Association
9. *Canadian National Railway Company
   Canadian Pacific Limited
10. Bessemer and Lake Erie Railroad Company
    Elgin, Joliet and Eastern Railway Company
11. *American Paper Institute
12. *National Industrial Transportation League
13. *Itel Corporation Rail Division, et al.
14. *Pittsburgh & Lake Erie Railroad Company
15. Canadian Pulp and Paper Association

16. +American Trucking Associations, Inc. Regular Common Carrier Conference, Inc. Interstate Carriers Conference Brown Transport Corp.
17. +Southern Hardwood Traffic Association Southeastern Lumber Manufacturers Association North American Wholesale Lumber Association
18. +Totem Ocean Trailer Express
19. +National Railway Utilization Corporation
    Pickens Railroad
    Peninsula Terminal Company
    The Mississippian Railway, Inc.
    Graham County Railraod
    Atlantic and Western Railway, Inc.
20. +Evans Products Company
    Board of Trade of the City of Chicago
21. +Patrick W. Simmons
22. +Various Brick Associations

* Filed Supplemental Stay Petitions.
\+ Filed for the first time on November 18, 1983.

APPENDIX G

49 U.S.C. 10505:

Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of this title and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require

any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle. Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-448, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 83-1462[*]

BRAE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

CONSOLIDATED RAIL CORPORATION,
E. F. HUTTON CREDIT CORPORATION,
SEATTLE & NORTH COAST RAILROAD COMPANY,
INTERVENORS

PETITION FOR REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

Before: ROBINSON, *Chief Judge;* WALD and MIKVA, *Circuit Judges*

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Interstate Commerce Commis-

[*captions omitted for Nos. 83-1465, 1466, 1468, 1469, 1479, 1490, 1538, 1543, 1544, 1546, 1547, 1551, 1555, 1558,1571, 1572, 1574, 1577, 1614, 1628, 1655, 1665, 1763, 1770, 1709, 1710, 1717, 1718, 2245]

sion, and were argued by counsel. Upon consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the orders of the Interstate Commerce Commission on review herein are affirmed in part, vacated in part, and these cases are remanded to the Commission for further proceedings consistent with the opinion for the Court filed herein this date.

Per Curiam
For The Court:

/s/ ______________________

GEORGE A FISHER
Clerk

Date: June 27, 1984
Opinion *per curiam*.